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LAW AND BUSINESS

VOLUME II

LAW AND THE MARKET
LAW AND FINANCE

BY

WILLIAM H. SPENCER

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EDITOR'S PREFACE

Collegiate training for business administration is now so widely attempted that the time has arrived when experiments should be conducted looking toward the organization of the business curriculum into a coherent whole. Training in scattered "business subjects" was defensible enough in the earlier days of collegiate business training, but such a method cannot be permanent. It must yield to a more comprehensive organization.

There can be no doubt that many experiments will be conducted looking toward this goal; they are, indeed, already under way. This series, "Materials for the Study of Business," marks one stage in such an experiment in the School of Commerce and Administration of the University of Chicago.

It is appropriate that the hypotheses on which this experiment is being conducted be set forth. In general terms the reasoning back of the experiment runs as follows: The business executive administers his business under conditions imposed by his environment, both physical and social. The student should accordingly have an understanding of the physical environment. This justifies attention to the earth sciences. He should also have an understanding of the social environment and must accordingly give attention to civics, law, economics, social psychology, and other branches of the social sciences. His knowledge of environment should not be too abstract in character. It should be given practical content, and should be closely related to his knowledge of the internal problems of management. This may be accomplished through a range of courses dealing with business administration wherein the student may become acquainted with such matters as the measuring aids of control, the communicating aids of control, organization policies and methods; the manager's relation to production, to labor, to finance, to technology, to risk-bearing, to the market, to social control, etc. Business is, after all, a pecuniarily organized scheme of gratifying human wants, and, properly understood, falls little short of being as broad, as inclusive, as life itself in its motives, aspirations, and social obligations. It falls little short of being as broad as all science in its technique. Training

186

BASIC ELEMENTS OF THE BUSINESS CURRICULUM

CONTROL

1. Communicating aids of control, for example
   a) English
   b) Foreign language

2. Measuring aids of control, for example
   a) Mathematics
   b) Statistics and accounting

3. Standards and practices of control
   a) Psychology
   b) Organization policies and methods

Of problems of adjustment to physical environment
- a) The earth sciences
- b) The manager's relationship to these

Of problems of technology
- a) Physics through mechanics, basic, and other sciences as appropriate
- b) The manager's administration of production

Of problems of finance
- a) The financial organization of society
- b) The manager's administration of finance

Of problems connected with the market
- a) Market functions and market structure
- b) The manager's administration of marketing (including purchasing and traffic)

Of problems of risk and risk-bearing
- a) The risk aspects of modern industrial society
- b) The manager's administration of risk-bearing

Of problems of personnel
- a) The position of the worker in modern industrial society
- b) The manager's administration of personnel

Of problems of adjustment to social environment
- a) The historical background
- b) The socio-economic institutional life
- c) Business law and government

for the task of the business administrator must have breadth and depth comparable with those of the task.

Stating the matter in another way, the modern business administrator is essentially a solver of business problems—problems of business policy, of organization, and of operation. These problems, great in number and broad in scope, divide themselves into certain type groups, and in each type group there are certain classes of obstacles to be overcome, as well as certain aids, or materials of solution.

If these problems are arranged (1) to show the significance of the organizing and administrative, or control, activities of the modern responsible manager, and (2) to indicate appropriate fields of training, the diagram on the opposite page (which disregards much overlapping and interacting) results. It sets forth the present hypothesis of the School of Commerce and Administration concerning the basic elements of the business curriculum, covering both secondary school and collegiate work.

These present volumes on *Law and Business* deal with one phase of the relationship of the business administrator to his social environment.

L. C. MARSHALL

AUTHOR'S PREFACE

These materials on *Law and Business*, presented in three volumes, are intended primarily for use in schools of business. They are prepared to serve as a basis of instruction in the legal aspects of business and are a part of a general collection of materials for the study of business. It is hoped, however, that they may be serviceable also to departments of political science and political economy.

In attempting to fit these materials into a coherent program of business education, I have kept in mind certain definite objectives which, in my opinion, should be sought for in the teaching of law in schools of business. These objectives have been worked out in terms of purposes and aims of business education in general.

Whatever else a school of business may have ambitions to do, it is now coming generally to be agreed that its most appropriate task is to instruct its students in the fundamental principles of business administration. In the nature of things, a school of business can do little or nothing in the technical aspects of business, because these aspects vary so greatly in different business activities. It can accomplish only slightly more in giving instruction in the administration of particular businesses. But underlying all forms of business activities there are certain fundamental principles of administration and management and it is to this field that the school of business must, for the most part, confine its activities. Effort has been made to present this point of view in the preparation of these materials on *Law and Business*.

This collection of materials is presented on the theory that a thorough study of them will assist the future business man in the administration of his business. A business man, for instance, should know something of accounting, not because he is going to be an accountant, but because he will not understand his business without a knowledge of it. Accounting is a form of control and a knowledge of it is an aid to administration. A business man should know some law, not because he is going to be a lawyer, but simply because he must have some appreciation of his relation to organized society in order to carry on his business intelligently and successfully. Law,

too, is a form of control and a knowledge of it is an aid to administration.

Speaking in general terms, the real purpose of teaching law in a school is, or should be, to bring to the future business man a certain awareness of the larger problem of social control. Whether he likes it or not, he must play the game according to the rules. He must therefore be brought to a realization that one of the conditions of carrying on business in our present economic order is that he submit himself and his business to the control of society. Law is one of the most important instrumentalities of social control and it is for this reason that students preparing for business should be given instruction in it.

More specifically, there are several objectives which should be reached by a proper presentation of these materials. (1) This study should introduce the student to the whole field of the law, give him a working knowledge of legal phraseology, and prepare him for the study of case material. (2) It should assist him in visualizing more clearly the structure of modern society, by showing him the part which law and legal institutions have played in its development. (3) The study should give the student a practical knowledge of the legal devices which business men use in the administration of their affairs. (4) It should give him an appreciation of certain portions of the law which directly and intimately throw around him the lines of social control. These rules of law, commanding this, prohibiting that, and permitting the other, are important because they mark out definite limits within which business men must formulate their policies. (5) It would seem not too much to hope that upon the completion of the study of these materials the student will have become fairly skilful in analyzing court decisions. This *desideratum*, if realized, should prove to be of the greatest value to the future business man. The power to analyze a court decision will not only open up and make available for him the whole field of reported cases but will also give him a certain mental outlook and resiliency which will aid him in adjusting himself to his social environment.

An arrangement, different from the orthodox arrangement of materials for the study of law, has been adopted in the preparation of these materials. This has been done consciously with the conviction that if the teaching of law is to justify its place in the curriculum of the school of business it must be less and less law after the traditional order and more and more business after the modern view. If the

key word of business education is *administration*, and if the purpose of teaching law to the business student is to assist him in mastering the principles of administration, then it would seem that the law for him, at least, should be worked out in terms of functions, relations, or problems of the business man, and not in terms of the order in which the law has developed. The arrangement, therefore, of the content of these materials on *Law and Business* has been made on a functional basis—in terms of business problems or relations, as far as this has been possible and feasible.

The functional materials have been preceded by introductory materials to which the first volume is devoted. The purpose of these is: first, to introduce the student to the whole field of the law by giving him a certain background of jurisprudence, a working knowledge of how rights are enforced, and some appreciation of the analysis of cases; second, to furnish the student with fundamental legal concepts from persons, torts, contracts, agency, and property, in preparation for the study of the functional materials which follow in later volumes; and third, incidentally to give him an appreciation of the place which law occupies in the structure of modern society. These materials are, as their name implies, an introduction to the study of *Law and Business.*

The materials which follow the Introduction are worked out in terms of the various relations or functions which seem typically characteristic of all forms of business. The first division of these materials deals with the law as it affects the business man's relation to his market. What are the legal devices which a business man may resort to in the administration of his market activities? What are the legal limitations on the choice of his market policies and practices? The second division treats of the legal problems involved in the administration of the business man's finances. What are the legal devices which assist him in getting money and credit? What are the legal devices for securing creditors? What are the remedies of creditors against their debtors? The third division deals with the law relating to risk-bearing as a function in business. To what extent does the law sanction the shifting of risks? What devices does the law furnish for the shifting of risks? The fourth division deals with the legal aspects of the business man's relation to his labor. What are the outstanding characteristics of the common-law contract of employment? What are the rights of the employer in competition with rival employers for labor? What are the rights of the employer in

competition with his employees for terms of employment? How have the various problems been dealt with in modern labor legislation? The fifth division of the materials deals with the law relating to the form of the business unit. What organization devices does the law recognize and sanction? What are the characteristics of these various organization devices? How are the various organizations formed, dissolved, and reorganized? How are they controlled, externally and internally? How are they financed?

The first volume of the materials on *Law and Business* is devoted to an Introduction to the study of *Law and Business.* The materials in this, the second volume, deal (1) with the legal aspects of the business man's relation to his market and (2) with the legal aspects of the business man's relation to his finances. The materials in the third volume will deal (1) with the legal aspects of the business man's relation to risk and risk-bearing, (2) with the legal aspects of the business man's relation to his labor, and (3) with the legal aspects of the business man's relation to the form of his business unit.

In conclusion, something should be said concerning the methods of instruction contemplated in the preparation of these materials. Perhaps more materials have been selected than any school can adequately consider in the time allotted by the curriculum to the study of law. This, however, has been done consciously and deliberately. The fact that excess material is placed in the hands of the student will be of distinct value even though it cannot be treated in class discussion. It will tend to develop in him a spirit of research which at present is sadly lacking not only in schools of business but in law schools as well. Moreover, this excess material will afford teachers some latitude in the choice of the material which they wish to use and in the subject-matter which they wish to cover.

It is very strongly felt that the study of law in schools of business should be largely inductive and should be based on case material as far as possible. Accordingly, these materials are composed for the most part of reports of leading cases. They have been carefully selected with a view both to their pedagogical qualities and to their business content. Each case has been stripped of its nonessential features for economies in time and space, but not to such an extent, it is hoped, that the didactic character of the case has been dissipated in the process of adaptation.

Each case or unit of material is followed by a series of questions and problems. These are typically of the following kind: (1) ques-

tions which serve to bring out the technical aspects of the principal case; (2) hypothetical cases which are intended to develop the doctrine of the principal case; (3) hypothetical cases which involve corollaries of the principal case; (4) questions and cases which connect the principal case with past cases and anticipate problems in future cases; (5) exercises which encourage investigation of statutory changes in the common law; and (6) exercises which encourage the examination and drawing of forms.

Definite and beneficial results should flow from the use of these exercises, questions, and cases. They will encourage the student to do collateral reading on portions of the subject which are not covered by the materials and which cannot be discussed in the classroom. Their use will assist the student in getting at the heart of a case by stimulating him to do much of his thinking before he comes to class. The questions and cases will serve as convenient devices for getting problems quickly before the class for discussion. The exercises will be useful in directing the student to investigate statutory changes and in assigning practical work.

I am conscious of the many imperfections of the present attempt to present materials for the functional study of law in schools of business. However, I keenly feel the need of materials with such an approach and believe that the present attempt is a step in the right direction, and that for the present they will fill a growing need in colleges and universities in the study of business.

I wish to take this opportunity of expressing my gratitude to Professor Herman Oliphant, of the Law School of Columbia University, formerly of the Law School of the University of Chicago, for the aid and advice which I received from him in the preparation of these materials. My debt of gratitude to Dean L. C. Marshall, of the School of Commerce and Administration of the University of Chicago, for his help in working out the functional approach to the study of law in schools of business is no less great. I wish also to express my appreciation to Mr. J. F. Christ, of the University of Chicago, for his assistance in preparing these materials for publication.

W. H. Spencer

Chicago, Illinois
November 1, 1921

LAW AND FINANCE

LAW AND THE MARKET

CHAPTER I

INTRODUCTORY TOPICS

A

Among the various relations in which a business man finds himself none is more important than his relation to the market. It does not matter so much what business activity he is engaged in, market problems of greater or lesser complexity will arise for solution. These problems are more than frequently complicated by the presence of legal difficulties of one kind or another. In the solution of them, therefore, the business man should have some understanding of the market devices which the law furnishes him as aids in administration and some appreciation of those limits which the law sets about him in his market activities. The purpose of this course is to give to the student, as far as possible within the time and space allowed, an understanding and appreciation of the law in its relation to the market.

On the one hand, it will be worth the student's while to know something of the market devices which the law recognizes and sanctions for his use in administering his market affairs. Among these devices are pledges, bailments, and sales. These are typical of the transactions by which the trader can acquire and dispose of the possession, use, and ownership of personal property, the chief subject-matter of trade and commerce.

The business man cannot afford to be unaware of the legal considerations involved in the use of these devices in the administration of his market affairs. What is required by law in the formation of these market agreements? What are the legal consequences which flow from their formation? What are the rights and duties of the parties to the transactions? What are the remedies of the parties in connection with the enforcement of the obligations which arise out of their formation? These are some of the legal problems which the business man must face in his market administration. It is of these and other related legal problems that a study will be made in the chapter on "Market Transactions."

On the other hand, the business student should have some appreciation of those limits within which he must formulate his market policies. The purpose of these policies will be to secure trade and to extend

business relations. Perhaps they will be formulated to create new demands and new markets; perhaps, to divert and secure the trade and patronage of competitors. In any event, the law sets definite limits beyond which the business man must not go in the extension of his market and in the diversion of the trade and patronage of his competitor. To some extent, of course, these limits will be marked out for the business man by the market devices to which reference has been made above. But they will be more definitely and more strictly drawn for him by those rules of law which categorically state what he shall and what he shall not do in carrying on his business. These legal considerations will be considered under the heading of "Market Practices."

In considering the legality or illegality of market practices, it is desirable in our analysis to ask, in the first place, what is the end sought or what is the interest at stake in the formation of the policy which lies back of the practice under consideration. Is the end sought legitimate? Is the interest at stake worthy of protection? Is it more deserving than the interest with which it comes into conflict? In general, in the study of market practices, we shall find that the end sought is commonly that of furthering one's trade success. Is this a legitimate end? Is it worthy of legal protection?

But even assuming that the end sought is legitimate, we must inquire, in the second place, whether the means used in accomplishing it are reasonable and fair. It is here that serious difficulties are most frequently encountered. What means are legal and what means are illegal in furthering one's trade interests? What market practices are fair and what market practices are unfair?

The usual contention is that a given practice is unfair because it injures a trade competitor. But is it not obvious that all competitive practices, to a greater or less degree, injure trade competitors? Is not the very essence of competition to further one's interests at the expense of competitors? But is it not equally clear that there must be some limit to which one may go in injuring another to advance one's trade success? Certainly some adjustment must be made between these conflicting interests. Our task, then, is to find, if possible, the standards of the law by which the fairness or unfairness of this class of market practices is judged.

It is urged that other market practices are illegal because they tend to injure the public through restraint of trade and competition.

But here too it must be pointed out that the end and aim of all competition is to drive out other competitors and thus ultimately to eliminate all competition. But some restrictions must be placed upon these practices which tend to injure the public. Our task is here to find, if possible, some adjustment between the conflicting interests of the trader and the public.

In some respects the common law has proved itself quite inadequate in dealing with market practices in modern business. On the one hand, its standards of fairness and unfairness developed in days of simple industry and simple business and are not altogether adequate in settling competitive controversies arising out of modern industry and modern business. On the other hand, the common law does not possess the most appropriate machinery for enforcing standards of fairness and unfairness. The common law can give damages when a person is injured by unfair market practices. Equity can enjoin such practices under special circumstances. But there are forms of unfair competition which cannot be sufficiently controlled by either type of relief. There are forms of unfair competition which should be under constant and continuous control of administrative machinery. This kind of machinery the common law does not have. Because of the inadequacy of the standards of the common law and because of its lack of appropriate machinery for enforcing standards, much legislation has been passed in recent years setting up new standards of market conduct and creating more efficient machinery for their enforcement. Little or nothing can be done in this course in the study of this legislation. Such a study belongs properly in a course on governmental intervention in business.

CHAPTER II

MARKET TRANSACTIONS

1. In General

RICE *v.* NIXON

97 Indiana Reports 97 (1884)

Elliott, C. J. The appellee was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him; and it was also his custom to sell wheat from his bin, but of this custom the appellants had no knowledge. In August, 1882, the appellant, Victoria Rice, deposited with the appellee two hundred and ten bushels of wheat; this was thrown into the common bin in accordance with the custom of the appellee, and with it was mingled wheat bought by him and wheat stored by other depositors, and from this bin wheat was sold, from time to time, but there was always in the bin wheat enough to supply all depositors, and at any time before the destruction of the warehouse by an accidental fire the appellant could have received from the bin all the wheat she had deposited. Some time after the storage of the wheat the warehouse and all its contents were destroyed by fire, but the fire was not attributable to the wrong or negligence of the appellee. No demand was made for the wheat until after its destruction. The wheat was stored with the appellee, and there was no agreement that the bailor should have an option to demand the grain or its value in money.

There are cases in which a bailee is responsible for the loss of goods where he commingles them with his own, but this principle does not apply where a warehouseman is mingling them with like articles of his own. This doctrine is older at least than *Lupton* v. *White*, 15 Vesey Jr. 432, for there Lord Eldon said:

> What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they are of equal value, the latter must have the given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party can not tell what was the original value of his property, he must have the whole.

Chancellor Kent takes a like view of the question, and his last editor, Judge Holmes, cites a great many cases upon the subject. 2 Kent, *Commentaries* (12th ed.), 365,590. This is the view taken by the text-writers and courts generally in cases where the deposit is made with a warehouseman. Story, *Bailment*, section 40; Law of Prod. Ex., section 152; 2 Schouler, *Personal Property*, section 46; 6 Am. L. Rev. 457; 2 Blackstone, *Commentaries*, Cooley's ed., 404, note. There is, however, as shown by the cases cited, some conflict of opinion, but, as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common. Law of Prod. Ex., section 154, auth. note 9.

The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser, and if he is not a purchaser, then he

is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights, and liabilities of warehousemen are prescribed by the law as declared by the courts and the legislature, and as matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless, indeed, there is some stipulation in the contract imposing that character upon him.

The cases in our own reports, cited by counsel for the appellants, do not oppose the conclusion here reached. In *Pribble* v. *Kent*, 10 Ind. 325, the defendants received of the plaintiff one hundred and thirty-two bushels of grain, and on demand failed to deliver the wheat, and it was held that an action would lie, but the contract was held to be one of bailment, and not of sale. It is plain, therefore, that in the case cited there was no such ruling as that asked by the appellants in the present case; on the contrary, the ruling overturns their theory. In *Ewing* v. *French*, 1 Blackf. 353, and *Carlisle* v. *Wallace*, 12 Ind. 252, the wheat was delivered to a miller to be ground into flour, and this was held to be a sale, on the ground that the character of the article was to be entirely changed and a new and different article was to be given by the miller to his customer in return for the wheat. In the last of the cases cited the option of demanding wheat, flour, or money was vested in the depositor, so that he had the option of making the contract one of bailment or one of sale, and he exercised that option by treating the transaction as a sale. In the case under examination there was no option, for it is expressly found that the wheat was received by the warehouseman for storage. The case of *Ashby* v. *West*, 3 Ind. 170, holds that one who delivers wheat to be manufactured into flour is the owner of the flour and may maintain replevin, the court saying: "We are clearly of the opinion that that contract is one of bailment, and not of sale," and this is against the contention of the appellants.

In deciding that the contract was one of bailment, and not of sale, we determine the only debatable question in the case, for it has been long settled that where property in the custody of a bailee is destroyed by an accidental fire, and there has been no fault or negligence on his part, he is not liable.

We have examined the rulings on the demurrers to the answers and think they were correct, but if we were wrong in this there could be no reversal, because the special finding clearly shows the ground on which the judgment rests, and from this it appears that if the rulings were erroneous the errors were harmless.

Judgment affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. Suppose it had been the intention of the parties that the appellee should receive the grain and return flour to the appellant on demand, what would have been the nature of the relation created by their contract?
3. Suppose that it had been agreed that the appellee should pay for the grain on demand, what relation would have been created by the contract?
4. What difference did it make in the principal case whether the transaction resulting from the contract was a bailment, barter, or sale?
5. The court said that whether the transaction was one legal relation or another depended upon the intention of the parties. What does the court mean by *intention?* How is the intention proved? What evidence of any intention was there in this case?
6. P delivers corn to D, who agrees to grind it and return corn meal to P. (*a*) Before the corn is ground it is destroyed by fire. (*b*) It is destroyed by fire after it is ground. Upon whom does the loss fall in each case?
7. P delivers a horse to D with the understanding that D may use it for ten days and purchase the animal at any time within the ten days upon the payment of $250 to P. What is the legal relation between the parties?
8. P owes D $500. To meet D's demand for immediate payment, P delivers ten shares of stock to D by way of security. What relation is created between the parties by the transaction? What rights does D get by the transaction?

HARRISON *v.* LUKE

14 Meeson & Welsby's Reports 139 (1845)

Debt for goods sold and delivered, and on an account stated. Plea, *nunquam indebitatus*. This was a case tried before the Recorder of Hull under a writ of trial. The plaintiff was an oil and colorman residing at Hull, and the defendant a ship-owner at Charlestown, in Cornwall; and it appeared, that on July 27, 1839, the defendant wrote a letter to the plaintiff, stating that he had a yellow ochre mine, and should the plaintiff be a purchaser of ochre, he would supply him with any quantity, and would take goods for it. To this letter the

plaintiff returned the following answer: "I have no objection to taking eight or ten tons of ochre, and you take paint, or any other article, in exchange. Should you feel inclined to barter, please let me know as early as possible." The parties accordingly supplied each other and continued to deal on this footing for some time, exchanging paint for ochre, until March, 1841, when the balance was in the plaintiff's favor; and in a postscript to a letter, dated March 1, 1841, from the plaintiff to the defendant, the plaintiff requested defendant to send ochre "*to balance our account.*" No more ochre, after this time, was received by the plaintiff. The action was brought in December, 1844. At the trial it was objected for the defendant, that the plaintiff ought to be nonsuited, as the transaction being one of barter he was not entitled to recover the value of the goods in money. The learned Recorder directed a verdict for the plaintiff for the amount proved, giving leave to the defendant to move to enter a nonsuit.

Pollock, C. B. I am of opinion that this rule ought to be made absolute. Where there is a contract of barter, and one of the parties omits to send goods in return, it cannot be contended that the other may bring an action for goods sold. No mere lapse of time will turn a contract of barter into a contract for goods sold.

Parke, B. The plaintiff's remedy is by an action against the defendant for not delivering the ochre pursuant to the contract between them. The ground of Lord Ellenborough's decision in *Ingram* v. *Shirley* was that the parties, by stating a balance of £25 to be due, intended that amount to be paid in money. But if there be a contract of barter, you cannot change that into a contract to pay in money, unless the parties come to a fresh agreement to that effect. The defendant's not sending the ochre is a breach of the old agreement only.

Rule absolute.

QUESTIONS

1. What is meant by the statement that the plaintiff was nonsuited? Why was he nonsuited?
2. What action did the plaintiff bring in this case? What action should he have brought?
3. What legal relation was created between the plaintiff and the defendant by the contract which they entered into?
4. How is a sale defined in the American Sales Act? What is the difference between a sale and a barter?
5. What is the difference between a sale and a bailment? a bailment and a barter?

6. What is a gift? How can a gift be made? What is the difference between a gift and a sale?
7. What is the difference between a sale and a contract to sell?
8. What is a chattel mortgage? How does it differ from a pledge? from a sale?
9. A statute forbids the sale of intoxicating liquors. D gives a bottle of whiskey to P for a pair of shoes. Can D be indicted and convicted for violation of the statute in question?
10. D contracts to furnish materials and make a suit of clothes for P. What legal relation results from the contract? a sale? a contract to sell? or a contract to furnish materials and services? What difference does it make whether one relation or another is created?
11. List as many market transactions as you can. Show how each is a market transaction.

2. Bailments

a) Nature and Formation of the Relation

When one considers the nature of the relation of bailor and bailee, the simplicity of its formation, the various uses to which it may be put, it is not surprising to learn that it is one of the oldest of legal transactions. The bailment relation has been recognized from earliest recorded times and has been sanctioned, defined, and regulated in all systems of law. Though it is a relation which is utilized in all walks of life and in all social and economic activities, it is of peculiar importance in the field of marketing. It is one of the important market transactions. It is at the foundation of transportation, storage, and factorage, as well as many other market activities.

In legal literature the bailment relation has been defined in various ways. The term *bailment* comes from the French word *bailler* which literally means "to deliver." Blackstone in his *Commentaries* defines a bailment as "a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee." Sir William Jones in his classic essay on bailments defines the relation as "a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered." Story, whose writings were largely instrumental in shaping the modern law of bailments, has defined a bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust." These definitions, and

many others which might be cited, are in substantial agreement. It will be observed that the essential feature of the relation is the delivery of possession of personal property by one person, called the *bailor*, to another person, called the *bailee*, for some specific object or purpose. The relation does not necessarily spring from a contract between the parties: it may be gratuitously assumed; but it does, however, carry with it an obligation, express or implied, that the bailee shall, upon the accomplishment of the object or purpose of the bailment, return the subject-matter to the bailor or dispose of it according to his directions.

All bailments may be divided into three types: (1) bailments which are for the sole benefit of the bailor; (2) bailments which are for the sole benefit of the bailee; and (3) bailments which are for the mutual benefit of the parties.

Bailments for the sole benefit of the bailor include deposits and mandates. A deposit or *depositum* is a bailment by which the bailee undertakes without compensation to keep goods for the bailor. A mandate or *mandatum* is a bailment by which the bailee without compensation assumes to perform services in connection with the bailor's goods, such as transportation or repairs.

Bailments for the sole benefit of the bailee include *commodatum* and *mutuum*. A *commodatum* is a gratuitous loan of goods by the bailor to the bailee. In this type of bailment the specific goods are to be returned to the bailor. A *mutuum* is a gratuitous loan of goods to the bailee, not to be returned in specie but in kind. Under the common law a *mutuum* is not, strictly speaking, a bailment but rather a sale or a barter.

Bailments for the mutual benefit of the parties include pledge or *pignus* and hiring or *locatio*. A pledge or, as it is sometimes called, a pawn is a delivery of the possession of personal property by the pledgor to the pledgee to secure the performance of some obligation, ordinarily the payment of a debt owed by the pledgor to the pledgee.

Bailments by way of hiring or *locatio* are always for compensation and are of four kinds. *Locatio rei* is the first, and means the hired use of property. Secondly, there is the *locatio custodiae* which means that the bailor hires the bailee to assume possession of the goods primarily for safe-keeping. A *depositum* and a *locatio custodiae* are similar in that the bailee in each case takes possession of the bailor's goods primarily for safe-keeping; they differ in that the bailee is rewarded in the latter case for his services and is not in the former

case. In the third place, there is the *locatio operis faciendi* which means that the bailor has hired the bailee to perform services on or about the subject-matter of the bailment. Finally, there is the *locatio operis vehendarum*, which is a hiring of the carriage or transportation of the subject-matter of the relation.

QUESTIONS

1. How does Story in this reading define a *bailment?*
2. Is it necessary that a contract relation exist between bailor and bailee in a bailment? Is redelivery necessary for the existence of the relation of bailment? Is contemplated use of the property bailed necessary?
3. In what sense is a bailment a market transaction? What is the commercial importance of the study of the legal aspects of bailments and pledges?
4. Name and classify the different kinds or types of bailments.
5. Define and distinguish the following terms: deposit, mandate, *commodatum, mutuum, pignus* or pledge, and hiring.
6. P leaves his automobile in a garage for safe-keeping. What is the relation between the garage-owner and P?
7. P leaves his watch at a jeweler's place of business for repairs. What is the nature of the relation between the parties to the transaction?
8. P stores his furniture in D's warehouse. What is the nature of the relation between P and D?
9. P ships goods by the D Company from X to Y. What is the nature of the relation between P and the D Company while the goods are in transit? When the goods have reached their destination but before they have been delivered to P's order?

BURNS *v.* STATE

145 Wisconsin Reports 373 (1911)

MARSHALL, J. It seems to be thought that a bailment was not established by the evidence because some sort of contract *inter partes* was essential thereto. No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances—he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment,

regardless of whether such possession is based on contract in the ordinary sense or not.

It is said, generally, in the books, that a bailment is created by delivery of the personalty to one person by another to be dealt with *in specie* as the property of such other person under a contract, express or implied, but the word "contract" is used in a broad sense. The mutuality essential to the contractual feature may be created by operation of law as well as by the acts of the parties with intention to contract.

So it makes no difference whether the thing be intrusted to a person by the owner, or another, or by someone for the owner, or by the law to the same end. Taking possession without present intent to appropriate raises all the contractual elements essential to a bailment. So the person who *bona fide* recovers the property of another which has been lost, or irresponsibly cast away by an insane man, as in this case, is a bailee as much as if the same property were intrusted to such person by contract *inter partes*. In the latter case the contract creates the duty. In the former the law creates it. Such a situation is to be distinguished from that where one knowingly receives money paid him by mistake and fraudulently retains it. There the element of *bona fide* possession may be said not to exist and so the duty accompanied by such possession essential to a bailment not to have been created.

The finder of property who voluntarily *bona fide* takes it into his possession immediately, thereupon, has imposed upon him by law the duties of a depositary, the mildest type, as regards degree of duty, of bailee. Story, *Bailments*, sections 86, 87.

So the finder here of the cast-away money was clearly a bailee, and when his duties were voluntarily assumed by the accused he became such, and as there was no controversy in respect to such finding and assumption, the court's reference to the matter was proper.

QUESTIONS

1. How may the relation of bailor and bailee be created?
2. D finds P's watch in the street. Does he become a bailee by taking possession of it?
3. In the foregoing case, when he takes possession of the watch he does so with an intention to hold it against the world. Does he become a bailee of the property?

4. P puts a bag of wheat in D's wagon without D's knowledge. Does D ever become a bailee of the bag of wheat?
5. P having X's horse in his possession lends it to D. What is the relation between X and D as to the horse? between P and D?
6. D finds P's horse in his yard. D turns the horse out and it is stolen by T. P sues D in trover for conversion of the horse. What decision?
7. What kind of property may be held in bailment? cattle? money? bonds? shares of corporate stock? land?

b) *Rights and Duties of the Parties*

I. CARE OF SUBJECT-MATTER

EDDY *v.* LIVINGSTON

35 Missouri Reports 487 (1865)

BAY, J. Both plaintiffs and defendants were merchants—the former doing business in the city of St. Louis, and the latter in Salt Lake City, Territory of Utah. During the latter part of 1855 a clerk of the defendants by the name of Voorhis collected in Salt Lake City for the plaintiffs the sum of $1,500 in coin, and having no means of sending the same to St. Louis, and being unable to procure a bill of exchange for the reason that there were no bankers or dealers in exchange at Salt Lake City, nor person from whom exchange could be bought in such sums as the purchaser might desire, deposited said money with said defendants for safe-keeping, and with a view to their buying exchange with it and forwarding east by first good opportunity. The undertaking was without any compensation paid, or to be paid, and was a mere act of kindness and courtesy on the part of one business house toward another.

It appears from the evidence preserved in the bill of exceptions, that the principal portion of exchange upon the eastern states was furnished by the drafts of officers upon the treasury of the United States, in such amounts as the officers had need of, and were supposed to have authority to draw. Frequently several persons who desired to make remittances to the eastern states would unite their funds and purchase an officers' draft as a means of remitting.

The defendants in this case, using the money of the plaintiffs, deposited with them as aforesaid, and other money of their own, and also money of other persons, bought a draft drawn by one Heywood, Marshal of the United States for said Territory of Utah, upon the

treasury of the United States at the city of Washington, for $15,209.93, and remitted the same to their agent in St. Louis, with directions to pay the proceeds, when received, to the several persons entitled thereto, among whom were the plaintiffs to whom the agent was directed to pay said sum of $1,500.

At the time said draft was purchased, Heywood was in good credit and his drafts eagerly sought for as a means of remitting money. The draft was in due time presented at the United States Treasury for payment, and payment was refused upon the alleged ground that Heywood had not settled his accounts with the government. Subsequently, and since the institution of this suit, defendants settled with the government by giving up the draft on payment to them of about one-fourth of its face (and petitioned Congress to reimburse them for their loss).

The plaintiffs in this suit seek to charge the defendants for their failure to transmit to them the money received by them aforesaid. The cause was submitted to the court without a jury, and judgment was rendered for the full amount claimed, from which the defendants have appealed to this court.

At the trial the court declared the law applicable to the case to be as follows:

If the court find from the evidence that the plaintiffs, by their agent, deposited $1,500 in money with the defendants at Great Salt Lake City, which money the defendants, for the accommodation of the plaintiffs, undertook to transmit to them at St. Louis, by purchasing therewith a safe or reliable draft or drafts; if the defendants took the said money and added thereto their own and other moneys, so that the aggregate amounted to the sum of $15,209.93, and purchased therewith the draft spoken of by the witnesses; if the defendants purchased said draft in their own name, or in the name of their agents, and without the consent thereto of the plaintiffs; and if the defendants have since held said draft and kept the control of the same, and have compounded or received part payment thereof in discharge of the whole, without the consent of the plaintiffs, then the defendants are liable in this action.

This declaration of law, in our opinion, is erroneous. The contract of the defendants is what is called in the civil law, *mandatum*, and Chancellor Kent says, "A mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed." It is defined by other writers to be a bailment of goods, without reward, to be carried from place to place, or to have some

act performed about them. To a proper understanding of the question involved in this case, it is important to ascertain what obligations the law imposes upon the mandatary, and what amount of care and diligence he is required to exercise with respect to the matter committed to his charge. No general rule can be laid down which will be applicable to all cases of gratuitous bailment, for with regard to the care necessary to be taken much depends upon the circumstances of each particular case and the character and value of the thing bailed, and its liability to loss or injury.

Kent, in his *Commentaries*, II, 569, says: "It is conceded in the English as well as in the Roman Law that if a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss through the want of care, by which damage ensues to the other party, an action will lie for the misfeasance." He also contends that a bailee, who acts gratuitously in a case in which neither his situation nor employment necessarily implies any particular knowledge or professional skill, is held responsible only for bad faith or gross negligence, and instances the case of a general merchant who undertook, voluntarily and without reward, and upon request, to enter a parcel of goods for another, together with a parcel of his own of the same sort, at the custom-house for exportation, and he made an entry under a wrong denomination whereby both parcels were seized; it was held he was not liable for the loss, inasmuch as he took the same care of the goods of his friend as of his own and had not any reward for his undertaking; and he was not of a profession or employment that necessarily implied skill in what he undertook. He acted in good faith, and that was all that could be required.

Lord Loughborough said: "that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, an omission of that skill is imputable to him as gross negligence." This view of the law is adopted by Story, who holds that at common law, when the contract is wholly gratuitous, and for the benefit of the mandator, the mandatary is bound only to slight diligence and responsible only for gross neglect.

The defendants, though acting gratuitously, having received the money of the plaintiffs, and undertaken to transmit it to them, were bound to perform their undertaking in good faith and with due diligence and attention adequate to the trust reposed in them, and

this question of diligence is one of fact, to be tried like any other fact in the case, and upon the determination of which depends the liability of the defendants; but in the declaration of law made by the court below, this question of diligence, the only real question in the case, is entirely ignored and the defendants made liable, although they may, in good faith and with due care and attention, have attempted to transmit the money by the means and in the manner most usual in such cases and which a man of ordinary prudence would be likely to adopt.

For this error, the judgment will be reversed and the cause remanded.

QUESTIONS

1. What error did the lower court commit which rendered a reversal of its decision necessary?
2. What kind of bailment was under consideraton in this case? What degree of care, under the decision of the case, is a bailee of this kind obliged to exercise?
3. Who determines what kind of bailment results from a given transaction? Who determines what degree of care must be exercised by a given bailee? Who determines whether that degree of care has been exercised?
4. Is the degree of care which a bailee exercises over his own property a legitimate test of the care which he should exercise when gratuitously caring for the goods of another?
5. D gratuitously promises to insure P's house. P, relying upon D's promise, does nothing. D fails to insure the house. Later, the house burns. P sues D for damages. What decision?
6. P's horse gets sick. D, professing no skill in caring for sick horses, gratuitously undertakes to cure the horse. He does the best he can, but his efforts cause the death of the horse. P sues D for damages. What decision?
7. In the foregoing case, D professes to have skill as a veterinarian when in fact he has no such skill. He does the best he can but his efforts cause the death of the horse. P sues D for damages. What decision?
8. D gratuitously undertakes to care for P's horse. (*a*) D rides the horse moderately, which he keenly enjoys. (*b*) He uses the horse for ploughing. What, if any, is his liability to P in each case?

BROWN *v.* HITCHCOCK

28 Vermont Reports 452 (1856)

Action in assumpsit for damages. The defendant took exception to the instruction of the lower court. The jury returned a verdict for the plaintiff, after which the defendant moved in arrest of judgment that the declaration was insufficient. This motion was overruled, to which the defendant also excepted.

Isham, J. The declaration in this case contains two special counts in assumpsit, and also the general counts. The contract was read in evidence on the trial of the case, without objection. It appears from the case, that the defendant received from the plaintiff seven hundred and fifty-six pounds of palmleaf, under an agreement to manufacture it into hats as soon as he had worked up the material he then had on hand, or to return it to the plaintiff when called for. If the leaf was manufactured, it was to be accounted for at different prices. The leaf was never used for that purpose, and it appears that it became much injured while in the defendant's hands, by heat and mildew. The plaintiff insisted that the contract was one of sale. The court held that it was one of bailment merely, and to that ruling exceptions were taken. We think the decision of the court was correct on that subject. As the leaf was never worked into hats, the question does not arise in the case to whom the hats would belong if they had been manufactured. It is obvious that, so long as the leaf was unmanufactured, it remained the plaintiff's property, as the identical leaf was to be returned to him on demand. That is the express provision of the contract. While the leaf remained in that state, the duties and obligations arising out of the relation of bailor and bailee existed between them. That relation necessarily results from the fact that a property in the leaf, while in that state, remained in the plaintiff.

We perceive no objection to the admission of the testimony which was offered by the defendant in relation to the condition of the leaf when left and the care subsequently exercised over it by the defendant, nor to the testimony in relation to the usage and custom in packing leaf for market, as also the necessity and custom of taking the leaf from the sacks and exposing it to the air to prevent its becoming injured and valueless. In relation to all that testimony, it may be observed that it was not offered to control or in any way to affect the contract between the parties. Its object was simply to ascertain the character and degree of care which the defendant should have exercised and that which he did exert over the property while it was

in his possession. The question in issue was, whether the defendant had been guilty of negligence in taking care of that property while it was in his charge. On that question the evidence was proper for the consideration of the jury that the leaf was placed in a chamber selected by the plaintiff, and which he thought was suitable, and that leaf had been kept there in that manner without injury. It was proper also to show that the leaf was damp and in an unmerchantable condition when it was left, and that the injury arose from that cause, and not from the want of care on the part of the defendant. On the other hand, it was proper for the plaintiff to show that it was usual and customary to put leaf in sacks in a damp state for market, that it was usually bought and sold in that way, and also the necessity and custom of taking the leaf from the sacks and exposing it to the air. The defendant being a manufacturer of leaf into hats, and having received this leaf for that purpose, is supposed to know what is necessary, and the kind of care required to preserve it. On that subject, contradictory as the testimony may be, it became a question for the jury to determine, under proper instructions from the court, whether the defendant exercised proper prudence and care in taking charge of that property, while it was in his possession.

The court properly charged the jury that the defendant was bound to exercise ordinary care in preserving the property from injury; not that care which the defendant exercised over his own property, but that care which men of ordinary prudence and judgment exercise over property of their own. Taking the whole contract together, it is obvious that the bailment was one of mutual benefit. The plaintiff was to derive benefit from the disposition and manufacture of the leaf into hats, and the defendant in manufacturing them. It was ordinary care, therefore, that the defendant was bound to exercise over that property. The jury have found, by their verdict, that the defendant did not exercise that degree of care, and that the injury to the leaf was occasioned by it. We see no error in the decision of the court on the trial of the case, and the verdict of the jury is conclusive as to the facts. The exceptions allowed to both parties are overruled, and the judgment of the county court is affirmed.

Judgment affirmed.

QUESTIONS

1. What type of bailment was under consideration in the principal case?
2. What degree of care must be exercised over bailed property by a bailee of this class?

3. P let D have the use of his horse without compensation. Returning from a drive of eighteen miles the horse sickened and died. P sued D for damages. The court instructed the jury that if D exercised ordinary and reasonable care in driving the horse D would not be liable in this action. The jury returned a verdict for D. P appealed and assigned the instruction of the court as error. What decision?
4. P owned and operated an elevator at X, where there was no bank, and was accustomed to pay all demands by checks on a bank eighteen miles away. As an accommodation to P, D agreed to keep P's money in his, D's, safe so that P could pay demands in cash. This meant an increase in trade for D and others in X. Thieves broke in D's safe and stole all of P's money. In an action by P against D for damages, the court instructed the jury that P was under a duty to exercise reasonable care in keeping the money. Was this instruction correct under the circumstances?
5. (*a*) What degree of care is exacted of a bailee for hire? (*b*) What degree of care is exacted of a bailee without compensation? (*c*) What degree of care is exacted of a bailee who has the gratuitous use of property?

HART *v.* CHICAGO & NORTHWESTERN RAILWAY CO.

69 Iowa Reports 485 (1886)

On the eighteenth of April, 1883, plaintiff delivered to defendant, at the city of Des Moines, one car-load of property which the latter undertook to transport to the town of Miller, in the Dakota territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain, a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered, and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than $100 each, unless by special agreement noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to, and did, ride in the car with them. When the train reached Bancroft, in this state, it was discovered that the hay which was carried in the car to be fed the horses on the trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The trainmen and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This action was brought to recover the value of the

property. There was a verdict and judgment for the plaintiff, and defendant appeals.

Reed, J. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant, who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. *Coggs* v. *Bernard*, 2 Ld. Raym., 909; *Forward* v. *Pittard*, 1 Durn. & E., 27. His undertaking for the safety of property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence or not is immaterial also. If the immediate cause of the loss was the act of

the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which the plaintiff's servant, by his direction, took into the car, and which, at the time, was in the exclusive control and care of the servant, the defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch., *Carriers*, section 216 and cases cited in the note; also Lawson, *Carriers*, sections 19 and 23.

Section 1308 of the Code is as follows:

> No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into.

Counsel for plaintiff contends that the provision of the shipping contract, by which plaintiff undertook to care for the horses while they were being transported, is in violation of this section, and consequently is void. For the purpose of the case this may be conceded, and yet it does not follow that defendant is liable for the loss, if it was caused by plaintiff's act. If it should be conceded that defendant was responsible for the proper care of the property while it was being transported, it would follow only that plaintiff was an intermeddler in placing his servant in the car, and in assuming to care for it. If the injury was caused by his act, it is immaterial whether he was proceeding under a valid contract or as an officious volunteer in doing the act.

The evidence tended to prove that two of the horses were worth \$150 each, and that two others were worth \$125 each, and that the others were worth \$100 each. Defendant asked the circuit court to instruct the jury that, under the contract, defendant's liability for the horses could not exceed \$100 per head. The court refused to give this instruction and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation, or contract, limit his liability for the property received by him for carriage has been the subject of much discussion, and there is great conflict in the decision

of the courts on the question. We have no occasion, however, in this case to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule, or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport property from this state into another state or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of the defendant for the horses to an amount less than the actual value of the property, is repugnant to its provisions and consequently invalid.

The judgment of the circuit court will be reversed.

QUESTIONS

1. What was the issue under consideration in this case? How was it decided? What rule of law can be deduced from the decision?
2. "The carrier is held to be an insurer of the property while he has possession of it as a carrier." How does this liability differ from the liability of an ordinary bailee of goods? What is the reason for the unusual liability of a common carrier?
3. Who is a common carrier within the meaning of the statement in the foregoing question?
4. It is said that a common carrier is under a duty (*a*) to carry for all, (*b*) to furnish reasonable and equal facilities for all, (*c*) to indemnify the owner against loss or damages to the goods while in transit, (*d*) to respond in damages for losses occasioned by delay and deviation in the transportation of the goods. What is the extent of the carrier's duty in each case?
5. Due to an ordinary rain the dirt in a cut was loosened, resulting in a landslide across the tracks of the D Company. One of the company's trains unavoidably ran into the dirt and was wrecked, causing damages to goods which had been shipped by P. P sues D for damages. What decision?
6. Perishable fruit belonging to P was frozen in an unprecedented cold spell while the goods were in transit. Had the carrier shipped the goods when directed they would have reached their destination in safety. P sued the carrier for damages. What decision?

7. P directed the carrier to ship goods through Y to Z. The carrier shipped them through X. While at X, the car in which P's goods were, was struck by lightning and, with all its contents, destroyed. P sued the carrier for damages. What decision?
8. P shipped ten casks of molasses by the D Company. Due to fermentation, the casks exploded while in transit. P sued D for damages. What decision?
9. To what extent can a common carrier by contract limit its common-law liability for loss or damage to goods while in transit?

ST. LOUIS, ALTON & TERRE HAUTE RAILWAY CO. *v.* MONTGOMERY

39 Illinois Reports 335 (1866)

Lawrence, J. This was an action upon the case brought by appellee against appellant to recover the value of a quantity of hay burned upon the cars of the appellant. It appears from the evidence that the hay was placed on the platform cars on Friday, and on Saturday morning the conductor of the freight train was about to take it away when the plaintiff said he did not wish it to go until he could see Mr. Ketchum, to whom he had sold it. In consequence of his request the cars were left, and the next day the hay was ignited by sparks thrown from the locomotive of a passing passenger train, and a considerable portion was consumed. The plaintiff recovered a verdict on the trial, and the defendant appealed.

There is nothing in the record showing carelessness on the part of the appellant, except the single fact of leaving the hay standing upon the side track exposed to the sparks of a passing train, and this carelessness and exposure resulted from the express request of the plaintiff. It was the unquestionable duty of the railway company to send off the hay as soon as it was placed upon the cars, and this duty they were about to perform, and refrained from its performance solely at the request of the plaintiff himself. When he objected to having the hay go forward he knew its exposed position, and to what dangers it was liable. These dangers having been incurred at his own request, with full knowledge of their character, and the company having been guilty of no other negligence by which the hazard to the hay was increased, there is no principle of law which will enable this plaintiff to charge the appellant with the consequences of an accident due only to himself. The proof shows that the locomotive was

equipped with the best apparatus for arresting sparks. There is no evidence in the record showing that the platform cars on which the hay was loaded could have been taken to any place on the side track where the hazard from passing trains would have been diminished.

Neither can the company be made responsible through its liability as common carrier. A common carrier, it is true, is liable for all losses not arising from the "act of God," or the public enemy, in neither of which categories would the loss in the case before us fall. But the technical liability of a common carrier does not attach until the delivery to him of the property is complete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a common carrier. He must exercise reasonable care, but he is not an insurer against all losses except those arising from the "act of God" and the public enemy. Angell on *Carriers*, section 134, and cases there cited. That was, in principle, the position of the defendants in the present case. They had received the goods and placed them on a car, and the plaintiff, with full knowledge of the risks to which they might be exposed from passing trains, requested that they should not be forwarded until he had seen Ketchum. From the moment that request was made, and while the defendants were detaining the hay in consequence of it, they were only liable for losses which might have been guarded against by the exercise, on their part, of ordinary care and diligence. The mere leaving of the goods where the plaintiff requested they might be left, and subject to no more hazards than the plaintiff knew they must be subject to, is certainly not a want of ordinary care for which the defendants can be held chargeable. They were still bound to use all possible diligence to prevent the escape of fire from their trains, and such diligence seems to have been used.

There was also a count for burning the plaintiff's meadow at another time. The damages under this count could have formed but a small part of the verdict. The jury might with propriety have given a verdict for the injury to the meadow, as the company failed to prove that the engine was properly guarded against the escape of fire. The burden of making this proof was on the company. *Bass* v. *The Chicago, Burlington, and Quincy Railroad Co.*, 28 Ill. 1. As the verdict must have been based chiefly on the count for burning the hay, we must reverse the judgment.

Judgment reversed.

QUESTIONS

1. Would the decision in the principal case have been the same in case the owner had not requested the carrier to delay in shipping the goods?
2. P delivers goods to a carrier for shipment which the carrier accepts. There is no train, by which they can be forwarded, until the following day. During the night the depot, in which P's goods had been stored, burned. In an action by P against the carrier for damages what should the court instruct the jury as to the liability of the carrier?
3. P delivers goods at the depot for shipment. The carrier informed P that they would not be forwarded until properly prepared for shipment. P said that he would return the following day and put them in proper condition. During the night the depot and its contents burned. In an action by P against the carrier how should the jury be instructed as to D's liability?
4. X, a cattle-buyer, had been financed in his business from time to time by P. On one occasion he was in Chetopa, Kansas. T, knowing of X's connection with P, telegraphed in X's name to P for $4,000. P telegraphed back that the money had been sent by the D Express Company. Other telegrams were exchanged between P and T in the name of X. When the money arrived, addressed to X, T identified himself as X by the telegrams and by the proprietor of a hotel where T had been staying under the name of X for about a week. This is an action by P against D for the money in question. What decision?
5. How long after goods have arrived at their destination does the liability of a common carrier as such continue? In any event, is the carrier under an obligation as a carrier to deliver the goods at the place of business of the consignee?

II. USE AND POSSESSION OF SUBJECT-MATTER

HARTFORD *v.* JACKSON

11 New Hampshire Reports 145 (1840)

Assumpsit, for the use of a boat, or schooner, let to the defendant by the plaintiff for a term of five months from June 20, 1838, at $13 per month, payable at the expiration of each month from that date. The rent falling due for the boat on July 20, and August 20, was duly paid, and this suit was brought to recover the rent due for the month ending September 20. The defendant pleads the general issue.

It was conceded that the rent falling due in September was unpaid; but the defendant contended that no liability for such rent existed against him, for the reason that the boat was withdrawn from

his custody and control by attachment and removal of the same by the creditors of the plaintiff before September 20.

On the foregoing facts a verdict of $13 was taken for the plaintiff, subject to the opinion of this court; judgment to be rendered thereon, or the verdict set aside and judgment entered for the defendant, as the court shall direct.

Upham, J. It is perfectly clear that an attaching creditor can take no greater interest by his attachment, and exercise no greater rights over property taken, than the debtor himself could. If we can determine, then, the precise rights of the bailor in the case before us, and the extent to which he might go in asserting any claim over the boat or schooner bailed, we shall fix the limits and powers of an attaching creditor over the same property.

It is well settled that the bailee has the exclusive right to property during the time of bailment, while exercising this right according to the terms and conditions of such bailment. This right is not only exclusive against third persons, but against the owner of property, who has no right to disturb him. Story on *Bailments*, 262; 2 Tuant. 268, *Roberts* v. *Wyatt*. If the owner disturbs the bailee in the use of the property, or if he takes it away before the bailment expires, the bailee may have trespass against the owner, and of course against any other person improperly interfering with the property. A recovery by a bailee against a trespasser is a bar to an action by the bailor for the same injury. A bailor cannot maintain trover or replevin against a person who converts property bailed, because, although he has a reversionary interest, he has neither the possession nor right of possession. 7 T. R. 9, *Gordon* v. *Harper*; 3 Pick. 255, *Wheeler* v. *Train*.

If such be the limitation of the rights of the bailor of property, and if the attaching creditor has no greater right over the property than the bailor, we see no ground for the interference of either with the property bailed in the present case.

The bailee had hired the property for five months, under an agreement to pay a certain sum monthly for its use. This contract had been fully kept by him; and while he is without fault or blame on his part, the property is attached on a suit against the bailor, and taken from the possession of the bailee. The officer making the attachment is, therefore, a mere trespasser against the bailee. He has no rightful claim to the possession of the property, and, so far as the bailee has been prejudiced, he has his remedy upon the officer.

If such be the case, the contract betwixt the bailor and bailee remains wholly undisturbed. There was nothing to show that the attachment was made through any agency, direction, or interference of the bailor, who is the present plaintiff. He is clearly entitled, then, to recover the amount stipulated to be paid him, until such time as the contract betwixt him and the bailee shall be legally terminated.

It has been suggested that a doctrine of this kind would enable debtors to screen their property from attachment, by nominal leases or bailments for hire. But if such lease or bailment is fraudulent, it is void, and a fraudulent bailment of property is no more readily made than a fraudulent sale, reserving a use to the owner. Besides, in all cases of bailment the property may be reached by trustee process, and the bailee or lessee of personal property would by such process be bound to deliver it on the termination of his lease, and be liable for intermediate rents, if unpaid. Should a bailee prove irresponsible under a fair contract made with him, it cannot be helped; it is alike the debtor's and the creditor's loss.

We see nothing, then, to prevent the payment of the rent agreed to be paid by the bailee. The bailee must be held to the performance of his contract; and if others have improperly interfered with his rights, he is entitled to his remedy against them.

Judgment on the verdict for the plaintiff.

QUESTIONS

1. To whom did the property belong in the principal case? If it belonged to the plaintiff, why could not his creditors have taken it in satisfaction of their debts?
2. If the creditors might not have gotten it by a writ of attachment, is there any other remedy to which they might have resorted?
3. D loans property to P for two months. Before the end of the two months, D takes the property back without P's knowledge. What are P's rights, if any, against D?
4. D hires property to P for two months and retakes it before the expiration of two months without P's consent. P sues D for damages. What decision?
5. P has possession of property of X. D negligently injures the property. (*a*) P sues D for damages. (*b*) X sues D for damages. What decision in each case?
6. X bails a horse to P. D steals the horse from P. (*a*) What are the rights of P against D? (*b*) What are the rights of X against D?
7. May the bailee insure the subject-matter of the bailment? If so, for how much? To whom does the insurance go in case of loss?

McCURDY *v.* WALLBLOM COMPANY

94 Minnesota Reports 326 (1905)

This was an action in trover in the district court to recover from the defendant $600 for the conversion of household goods. The case was tried before OLIN B. LEWIS, J., and a jury, which rendered a verdict in favor of the plaintiff for $350. From an order denying a motion for judgment notwithstanding the verdict, or for a new trial, defendant appealed. Affirmed.

JAGGARD, J. The pleadings in this case were framed to present issues in conversion. The plaintiff and respondent took the goods to the retail furniture store of the defendant and appellant for storage. The charge was agreed upon. The defendant explained that his warehouse, in which the goods were to be stored, was situated in another part of the city. With this knowledge, the plaintiff wanted the defendant to take the goods and store them, to which the latter assented. Thereupon the plaintiff took the goods in wagons hired by himself to the warehouse aforesaid, and saw them stored therein. At the time the goods were delivered, the party who had charge of the warehouse asked the plaintiff whether he (the latter) had insurance on his goods. The reply was that he had not, but that he should take it out. Thereafter the plaintiff was given a warehouse receipt in conventional form, which provided for storage generally, but did not specify where the goods were to be kept. Subsequently the defendant changed the location of its place of business to another point in the vicinity of its original or retail store, and seems to have abandoned its other establishments. To the new place it transferred the goods in question where they were destroyed by fire. There was no proof that because of such removal the plaintiff lost insurance. The jury returned a verdict for the value of the goods. From an order denying a motion for a new trial, defendant appealed.

Where goods, which have been removed by the bailee from an agreed to another place of storage without notice to or consent of the bailor, are destroyed by fire, the bailee is liable in an action at law for the reasonable market value of the goods. Schouler, *Bailments*, 106. Such a state of facts makes out "a case of the defendant having taken the plaintiff's goods to a place where he had no right to take them; therefore he must pay the loss." STEVENS, J., in *Lilley* v. *Doubleday*, L.R. 7 Q.B. Div. 510, more fully reported in 44 L.T. (N.S.) 814. And see *St. Losky* v. *Dividson*, 6 Cal. 644; *Lane* v. *Cameron*, 38 Wis. 603; Piggott, *Torts*, 353. The bailor is entitled

to the safety, to the convenience, and to any and every advantage of the agreed location. He is entitled to unchanged hazards as to things priceless to him personally, as well as to things only merchantable, and to insure or not, according to his judgment with reference to the place agreed. The bailee may not, to suit his own whim or interest, change his place of business and move the goods to a new place, and, if the goods be destroyed, refuse the bailor both his property and its value. If the rule were otherwise, how would the physical extent of the justifiable removal be determined? Would the bailee be allowed to remove the repository a mile out of the city? out of the country? The conventional requirements of the law, as to a bailee's care, would not contain the limitations. If, as here, the bailee no longer conducts the place at which the goods were received, it would be unreasonable to require the bailor to institute search to find his belongings. The point at which the bailee would be required to deliver the goods on demand might then have to be fixed by construction.

Any other rule than that here applied would serve no useful purpose, but would easily conduce to misappropriation and fraud, put a premium on craftiness, jeopardize the property of the ordinary prudent man, and wholly fail to afford adequate protection to the community in general.

The measure of damages ordinarily and here is the reasonable market value of the goods destroyed. Reason and all authorities concur that the rules governing are those of conversion, and not those of a breach of contract as laid down in *Hadley* v. *Baxendale*, 23 L.J. Exch. 179. There is an uncertainty whether *Davis* v. *Garrett*, 6 Bing. 716, a leading authority in this connection (Story, *Bailments*, note to 413*a*; *Lilley* v. *Doubleday*, *supra*), is a case in tort or on the contract; but, as to the extent of recovery, the damages usual in conversion are demonstrated therein to be proximate by unanswerable reasoning.

The question whether or not, in a particular case, the agreement was general as to place of storage or was specific, may be for the jury. In *Lilley* v. *Doubleday*, *supra*, the jury found for the plaintiff on this point. The court may, upon evidence, determine as a matter of law that there was no agreement to store in the particular place where the property was delivered by the owner, as in *Bradley* v. *Cunningham*, 61 Conn. 485, 23 Atl. 934, a case distinguishable, but not in a very satisfactory way from the one under consideration. However this

may be, we are of the opinion that in this case, upon its own peculiar facts, the learned trial court properly charged the jury, as a matter of law, that the bailee obligated himself to keep the goods stored in the building in which they were received, because the undisputed facts show a specific agreement to store in a designated place. That agreement was made before the issuance of the warehouse receipt in form indefinite as to place of storage. The conversation between the bailor and the bailee, taken in connection with the delivery of goods and all immediate subsequent transactions, prove a valid parol agreement, in which were specified, with sufficient definiteness, the parties, the consideration, the goods to be stored, and the place of storage. The name of the bailor was not expressly mentioned, but he was just as obviously a party to the contract. The place was expressly mentioned and involved in the execution of the contract, and is just as much a part of its terms as the consideration.

If an owner of exactly similar houses in a block shows a prospective lessee a particular one, the rental is agreed on, and the lessee is helped by the owner to put his household goods into that one, the owner cannot move those goods to another house, equally safe and desirable, and escape legal responsibility by saying that no specific house was designated. The inclination of courts toward implication for the benefit of the bailor in cases like the present one is well illustrated by *Davis* v. *Garrett*, *supra*, where it is held that "the law does imply a duty of the owner of a vessel to proceed without unnecessary deviation in the usual and customary course," and that if because of such deviation, the cargo is lost, the ship's owner is liable.

Order affirmed.

QUESTIONS

1. What action was brought by the plaintiff in this case? With what offense was the defendant charged in the action? What are the essential elements of the offense charged?
2. The court seemed convinced that it was the understanding of the bailor and the bailee that the goods were to remain in the warehouse in which they were originally stored. Do the facts of the case, in your opinion, justify this conviction?
3. If there had been no such express understanding, would the defendant have been liable in case the goods were lost after having been moved by the defendant to a new building?
4. P stores goods with D with the express understanding that they are to remain in a certain building. Without P's consent, D moves them one

block to a safer and newer building. Thieves break into the new building and steal P's goods. What decision in an action by P against D for the loss of his goods?

5. D without compensation agrees to take care of P's automobile while P is absent from the city. (*a*) D uses the machine moderately for his own pleasure. (*b*) He permits a friend of his to use the machine. (*c*) He hires the machine to X, a stranger to him. What is D's liability to P under each hypothesis, in case the machine is damaged?
6. P pledges his horse to D to secure a debt. (*a*) D rides the horse moderately. (*b*) He uses the horse for hauling. (*c*) He permits a friend to use the horse. What is D's liability to P under each hypothesis, in case the horse is injured?
7. Summarize the rules with reference to the use of bailed property by the bailee?

III. RETURN OF SUBJECT-MATTER

ESMAY *v.* FANNING

9 Barbour's New York Reports 176 (1850)

This was an action of trover for a carriage. The cause was referred to a referee, who reported that he found as facts that about June 1, 1846, the plaintiff loaned to the defendant the carriage in question, to be safely kept by the defendant for the plaintiff, and to be redelivered to the plaintiff on request; and that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that the carriage was obtained by the defendant from the livery stable of George L. Crocker, then of Albany City, and that he kept it safely till about November 1, 1846, during which time it was used occasionally by both parties, plaintiff and defendant; that the defendant had been requested to redeliver the same to the plaintiff. That about November 1, 1846, it was returned by the defendant to the stable of said Crocker; which return of the carriage to the stable of Crocker the referee decided was not a redelivery of the carriage to the plaintiff or his agent. He, therefore, reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given, as for a conversion of the carriage.

WILLARD, J. The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. (3 Barn. & Ald. 685.) The general requisites to maintain the action are, property in the plaintiff; actual possession

or a right to the immediate possession thereof; and a wrongful conversion by the defendant. (4 Barb. S.C.R. 565.)

The plaintiff's title was not disputed in this case. The issue is on the conversion: or, in other words, it is whether the defendant redelivered the carriage to the plaintiff or his agent, before the commencement of this suit. The plaintiff alleges a refusal to redeliver it, and the defendant avers that he did redeliver it. The referee found the fact that the defendant did not redeliver the carriage to the plaintiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this: whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In *Devereux* v. *Barclay* (2 Barn. & Ald. 702) it was held that trover will lie for the misdelivery of goods by a warehouseman—although such misdelivery was occasioned by mistake only—and this court, in *Packard* v. *Getman* (4 Wend. 613) held that the same action would lie against a common carrier who had delivered the goods by mistake to the wrong person. If trover will lie against a common carrier or warehouseman for a misdelivery, it can, under the like circumstances, be sustained against a bailee for hire, or a gratuitous bailee. It results from the very obligation of his contract that if he fails to restore the article to the rightful owner, but delivers it to another person not entitled to receive it, he is guilty of a conversion.

The referee found as a fact that the carriage was not redelivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it cannot be disturbed by this court. We think the referee drew the right conclusion from that fact and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. A delivery elsewhere, without authority, was a conversion. We have not

adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. (Story on *Bailments*, 117.)

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant, until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession, unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial, and the decision of the referee, refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument, on the implied obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject in this case, because here there was an express agreement to return the property to the plaintiff, on request.

The judgment must be affirmed.

QUESTIONS

1. What action was brought in this case? With what wrong was the defendant charged in this case?
2. The court said that a demand and refusal in this case were not necessary to make out a conversion. Why not?
3. D received possession of goods from A, agent of P. D returned the property to A for P in ignorance of the fact that P had just revoked A's authority. What decision in an action by P against D for conversion of the property?

4. D is in possession of property of P. X presents an order, purporting to be signed by P, but in reality a forgery, ordering D to deliver the property to X, which D does in good faith. X absconds with the goods. What decision in an action by P against D in trover?
5. P ships goods to one A. B. Smith. Another person by the same name identifies himself as A. B. Smith and the carrier delivers the goods to him. The A. B. Smith for whom the goods were intended sues the carrier in trover for conversion of his property. What decision?
6. D receives goods from T to whom he returns them in ignorance of the fact that T stole them from P. P sues D in trover for conversion. What decision?
7. D has goods which he received from X, reasonably believing that they belong to X. P notifies D that the goods are his and demands possession of them. (*a*) D delivers the goods to X. It turns out that the goods belong to P. What is D's liability to P. (*b*) D delivers the goods to P. It turns out that they belong to X. What is D's liability to X?
8. Under the circumstances of the foregoing case, what is the safest course for D to pursue?

JENSEN *v.* EAGLE ORE COMPANY

47 Colorado Reports 306 (1910)

WHITE, J. Jensen, the plaintiff in error, instituted this suit against the Eagle Ore Company, to recover the value of certain ore, and the sacks in which it was contained, alleged to have been delivered by the plaintiff to the defendant, and by the latter wrongfully converted to its own use.

The defendant is a corporation conducting and carrying on a general ore-sampling business, and buying and selling ore. The pleadings admit, or the undisputed evidence shows, that the plaintiff delivered to the defendant certain sacks of the value of $40.75, containing ore of the value of several hundred dollars, under an agreement that defendant would crush and sample the ore and deliver said property to plaintiff upon demand, unless a sale thereof to the defendant should be agreed upon between said parties; that no sale was consummated, and that plaintiff, prior to the bringing of the suit, made demand on defendant for the possession of said property, with which demand defendant refused to comply.

By agreement the case was tried by the court without the intervention of a jury. The contract of bailment and the possession of the property thereunder having been admitted, the plaintiff pre-

sented his evidence of value of the property in question, and rested the case. Thereupon the defendant undertook to establish its affirmative defense that the Cripple Creek District Mine Owners' and Operators' Association was the agent of the owner of said property and entitled to its possession and had asserted its right of ownership thereto. The trial court, however, over the plaintiff's objections and exceptions, declared and held that it was only necessary for the defendant to establish that the possession of the ore by the plaintiff was wrongful and unlawful; that it was wholly immaterial to whom the ore belonged, or as to the agency of said association; that if the evidence convinced the court that the ore was stolen, though it failed to disclose from whom, by whom, or when, and that plaintiff by any reasonable inquiry could have ascertained before he purchased it, that it was stolen, the plaintiff could not recover.

Upon this theory the court proceeded and so limited the inquiry, and at the close of the evidence dismissed the complaint. A motion for a new trial was filed, argued, and overruled, and judgment entered in favor of defendant for costs, to review which plaintiff appeals.

We are clearly of the opinion that the trial court adopted an erroneous view of the law, and thereby committed reversible error. The general rule is, that the bailee can discharge his liability to the bailor only by returning the identical thing which he has received, or its proceeds, under the terms of the bailment, but to this rule there are certain exceptions. The bailee may show that the property has been taken from him by process of law, or by a person having a paramount title, or perhaps excuse his default in some other way. But he cannot set up *jus tertii* against his bailor, however tortious the possession of the latter, unless the true owner has claimed the property and the bailee has yielded to the claim. Story on *Bailments*, 450, 582; Schouler on *Bailments*, 494.

Public policy and reason both combine to require that a bailee shall never be permitted to controvert the bailor's title or set up against him a title acquired by himself during the bailment which is hostile to, or inconsistent in character with, that which he acknowledged in accepting the bailment. This rule, however, does not preclude the bailee pleading and showing that he has been dispossessed by superior right, or that he holds the thing bailed, subject to such known right then asserted, and not by him known prior to the bailment.

Between the plaintiff and the defendant, the property was the plaintiff's. By accepting it under the contract of bailment the defendant not only admitted the plaintiff's title thereto, but also assumed with respect to that property, a position of trust and confidence which continues until the property is returned or lawfully accounted for. It was incumbent upon defendant, in order to relieve itself of the redelivery of the property or its proceeds to the plaintiff, to establish by a preponderance of the evidence that it actually delivered the property to the true *owner* on his demand. The defendant could not lawfully account for the property and relieve itself of its contractual obligation to the plaintiff, by showing that the property had been, before plaintiff secured possession thereof, stolen at some unknown time, by an unknown thief, from an unknown and unascertained owner, and that the bailor by reasonable inquiry could have ascertained such facts. It would be a serious reproach to the administration of justice if our courts should adopt a rule that permitted one to acquire possession of property from another under a specific contract to return it, and then subsequently repudiate that contract and retain possession of the property, under a claim of ownership acquired from one not specifically shown to have had title thereto. Such a procedure would have close resemblance to theft by sanction of law and cannot be approved. If the bailor has no title, the bailee can have none; for the bailor can give no better than he has. Still, without absolute title the bailor may have the right of possession, and the bailee certainly cannot dispute the right, unless by virtue of a specific title asserted, paramount to that of the bailor. *Bartels* v. *Arms*, 3 Colo. 72, 75.

And in *Anderson* v. *Gouldberg*, 53 N.W. 636, 637, it is said: "One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."

From what has been said it necessarily follows that the judgment must be, and accordingly is, reversed and the cause remanded.

Reversed and remanded.

QUESTIONS

1. What should the defendant have shown in this case to have made out his defense?
2. Upon what theory did the court proceed in denying the defendant the right to retain possession of the property in question?
3. X bails property to D and sells his interest in it to P. At the termination of the bailment, D delivers the property to X in ignorance of the sale to P. P sues D in trover for conversion of the goods. What decision?
4. In the foregoing case, D learns of the sale to P before the termination of the bailment. P demands possession of the goods from D at the termination of the bailment. D refuses to deliver the property to P, although at the time X has made no demand upon him for it. P sues D in trover for conversion. What decision?
5. D borrowed property from P for a few days. Afterward he refused to return it on the ground that the property belonged to him at the time he borrowed it. What decision in an action by P against D?
6. What policy of law is crystallized in the decision of the principal case?

IV. LIENS ON SUBJECT-MATTER

WILSON *v.* MARTIN

40 New Hampshire Reports 88 (1860)

Trespass for taking and carrying away two harnesses. Plea, the general issue. It appeared that the plaintiff, George L. Wilson, was the owner of the harnesses and that, for the purpose of getting them cleaned and oiled, he carried them to the shop of one Page, who was a saddler and harness-maker by trade, and employed himself, in connection with his business as a saddler and harness-maker, and as part of the same, in repairing, cleaning, and oiling harnesses. Page performed labor in cleaning and oiling these harnesses, and for that service was entitled to receive of the plaintiff the sum of two dollars. While the harnesses were thus in the possession of Page, and after he had performed the service aforesaid upon them, they were attached by the defendant, Asa Martin, as deputy-sheriff, upon a writ against one Morrison, as the property of Morrison; whereupon Page asserted his lien upon them for his labor done on the harnesses, as aforesaid, and refused to allow them to be taken from his possession by the defendant or anybody else until he was paid for such labor. The harnesses were moved from one room in Page's shop to another, and it was arranged between Page and the defendant that the harnesses should remain in Page's possession until his claim for labor was paid,

the defendant agreeing that if it became necessary, or if he should desire to take them away, that he would first pay to Page the amount of Page's claim. While the harnesses remained in this situation, and within some two days after their attachment by the defendant as aforesaid, this suit was brought against the defendant for said harnesses, but not until after the plaintiff had demanded them of the defendant and he had refused to give them up. Page's claim for services has never been paid, and the harnesses remain, and have ever remained, in his possession; and his lien on the harnesses for such services has in no way been released or discharged.

The court ruled upon the foregoing facts that the plaintiff could not maintain trespass, and a verdict was thereupon taken for the defendant, and judgment was to be rendered thereon or the same set aside and a new trial granted, as shall be ordered at the law term.

Fowler, J. The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation, according to their means, to receive and be at trouble and expense about the personal property of others, and was limited to certain trades and occupations necessary for the accommodation of the public, such as common carriers, innkeepers, farriers, and the like. But in modern times the right has been extended so far that it may now be laid down as a general rule, to which there are few exceptions, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods of another, has a lien upon the property for his reasonable charges in relation to it, and a right to retain it in his possession until those charges are paid. This includes all such mechanics, tradesmen, and laborers, as receive property for the purpose of repairing, cleansing, or otherwise improving its condition.

In the case at bar, Page had a lien upon the harnesses in controversy for the labor and expense he had bestowed in cleansing and oiling them, and at his election had a right to retain the possession and control of them until his charge in that behalf should be paid. He claimed his lien and asserted his right and still so claims and asserts his interest in the goods. He has never parted with the possession of the harnesses and still rightfully holds them against the plaintiff and all the world. By his assertion of his lien, his right to retain the possession of the harnesses, for the payment of the charges, became vested and must so continue as long as he shall retain that possession. He manifestly did not waive or intend to

waive his lien in consenting to hold the harnesses for the defendant. He only received and agreed to hold them subject to his own lien; and the defendant consented that Page should so receive and hold them, and that he would not as an officer interfere with them until that lien should be discharged; so that the lien was not affected or impaired by the arrangement. *Townsend* v. *Newhall*, 14 Pick. 332.

The gist of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of someone, but rightfully belongs to himself, or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure. But, where the general owner has parted with the actual possession, in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property.

In this case the plaintiff had parted with his possession of the harnesses by delivering them to Page to be cleaned and oiled. Page had cleaned and oiled them, and he thereby acquired and had asserted the right to retain them in his possession, even as against the plaintiff, until his charges for the labor and expense bestowed upon them should be satisfied. The plaintiff, then, had neither possession nor the right of possession in the harnesses, at the time of the alleged injury to them, and could not maintain trespass. *Cowing* v. *Snow*, 11 Mass. 415.

It has been urged in argument that, although not liable for the original attachment, the defendant became liable by the subsequent demand of the plaintiff for the harnesses, and his refusal to deliver them up. But, if we are correct in the view that the lien of Page, having been asserted, gave him a vested right to retain the possession of the harnesses until that lien was satisfied or the possession parted

with, and the lien had not been satisfied or the possession parted with by Page, as the case distinctly finds, then the plaintiff, at the time of the demand, had no right to the possession of the harnesses, and of course could not be injured by the refusal of the defendant to yield to him what he was not entitled to have.

The plaintiff having, at the time of the alleged injury to the harnesses by the defendant, neither the actual nor constructive possession of them, but the same being then and still in the hands of his bailee, who had and still has a vested right to retain them until the satisfaction of his lien thereon, there must be judgment on the verdict properly taken in the court below for the defendant.

Judgment upon the verdict.

QUESTIONS

1. What was the issue under consideration in this case? How was it decided? What rule of law can be deduced from the decision?
2. Suppose that Page had delivered possession of the harness to the defendant on the writ of attachment, would he have lost his lien?
3. Suppose that Page had delivered possession to the owner of the harness, would he have lost his lien?
4. Suppose that the owner had taken the harness from his possession without his consent, would he have lost his lien?
5. Page permits the owner to use the harness temporarily. Does Page lose his lien?
6. In the foregoing case, the owner, being temporarily in possession of the property, sells it to B, who has no notice of the lien. What are the rights of Page, if any, against B?
7. What is the essence of a lien? How does it arise? How long does it continue?

COOK *v.* KANE

13 Oregon Reports 482 (1886)

Lord, J. This suit was instituted by the plaintiff, as an innkeeper, to enforce a lien against a piano, put in his possession by the defendant as his guest, for a debt due for lodging and entertainment. By the facts stipulated it is admitted that the relation of innkeeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano and took it into his custody, that the piano was in fact the property of a third person, who had consigned it to the defendant to sell on

commission, but that the plaintiff did not know it was the property of such third person, but received it in his character as an innkeeper and as the property of his guest. Upon this state of facts, we are to inquire whether the piano is chargeable with an innkeeper's lien for board and lodging furnished his guest.

At common law, the liability of an innkeeper for the loss of the goods of his guest is special and peculiar, and, like that of the common carrier, is founded on grounds of public policy. It must not, however, be confounded with that of a common carrier; the liabilities, though similar, are distinct. (*Clark* v. *Burns*, 118 Mass. 275; Schouler on *Bailments*, 259.) Whatever controversy may exist in the judicial mind as to the true measure of the innkeeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional. (Schouler on *Bailments*, 261, and notes; *Coggs* v. *Bernard*, 1 Smith, *Leading Cases*, Am. Notes, 401.) Compelled to afford entertainment to whomsoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary privileges. It gives him, as a security for unpaid charges, a lien upon the property of his guest, and upon the goods put by the guest into his possession. (Overton on *Liens*, 129.) Nor is the lien confined to property only owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. (Schouler on *Bailments*, 292; *Calye's Case*, 1 Smith, *Leading Cases*, 247; *Manning* v. *Hottenbeck*, 27 Wis. 202.) But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel.

Whenever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession. It is true that the piano was shipped to the defendant in his name, but he brought it to the inn as his property, or at least it was brought there at his request and upon his order, and put in the custody and possession of the plaintiff as the property of his guest. It is admitted that the plaintiff received it as an innkeeper, and safely kept it as the property of his guest; nor is it doubted but what he would have been liable for its loss;

and in such case it is difficult to perceive upon what principle of law or justice he can be denied his lien. The judgment must be affirmed.

QUESTIONS

1. What was the nature of the lien under consideration in this case? How did it arise? What security did it give the plaintiff?
2. Suppose that the plaintiff had known that the piano belonged to a third person, would the decision in this case have been the same?
3. Suppose that the rightful owner had been suing the innkeeper for possession of the piano, what would have been the decision of this court?
4. T steals P's watch and leaves it with D, a jeweler, for repairs. (*a*) T demands possession of the watch. D refuses to surrender it until payment for the repairs is made. T sues D for conversion. (*b*) P demands possession of the watch. D refuses to surrender it until payment for repairs is made. P sues D for conversion. What decision in each case?
5. T steals property from P and ships it from X to Y by the D Company. P demands possession of the property at Y. The carrier refuses to deliver possession until the freight charges are paid. P sues D for conversion of his property. What decision?
6. How can a person who has a lien subject the subject-matter of the lien to the satisfaction of his claim?

V. ACTIONS IN RESPECT TO SUBJECT-MATTER

CHAMBERLAIN *v.* WEST

37 Minnesota Reports 54 (1887)

Appeal by the defendant from an order of the district court for Hennepin county, LOCHREN, J., presiding, refusing a new trial.

MITCHELL, J. This action was brought to recover the value of a diamond scarfpin, alleged to have been stolen from plaintiff's room while a guest at the West Hotel. It appeared from the evidence that the plaintiff was not the general owner of the pin, but that a year or two previous he had borrowed it from a friend, who, he says, "loaned it to him for ten years." The plaintiff had a verdict for the full value of the property. The defendant's contention is: First, that plaintiff, being a mere gratuitous bailee, had no such interest in the property as would entitle him to recover; and second, even if he could maintain an action, he could only recover the value of his special property in the thing.

Nothing is better settled than that, in actions for torts in the taking or conversion of personal property against a stranger to the

title, a bailee, mortgagee, or other special-property man is entitled to recover full value and must account to the general owner for the surplus recovered beyond the value of his own interest, but as against the general owner or one in privity with him he can only recover the value of his special property. A mere depositary or gratuitous bailee may maintain such an action. The bailee may maintain it, although not responsible to the general owner for the loss. This he may do, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost; as, for example, a common carrier or innkeeper.

Whether this pin was stolen from plaintiff's room, and whether he himself was guilty of contributory negligence, were, under the evidence, questions of fact for the jury. There is evidence reasonably tending to support the verdict, and hence this court cannot disturb it.

The defendant sought to relieve himself from his common-law liability as innkeeper by showing compliance with Gen. St. 1878, *c.* 124, sections 21, 22, (Laws 1874, *c.* 52). This statute requires the innkeeper, in order to bring himself within its provisions, to keep in his hotel an iron safe, suitable for the custody of money, jewelry, or other valuables, *and to keep posted conspicuously at the office, also on the inside of every entrance door of every public sleeping, reading, bar, sitting, and parlor room of the hotel*, a notice to the guests that they must leave their money, jewelry, and other valuables with the landlord for safe-keeping. It is incumbent on an innkeeper claiming the benefit of this statute affirmatively to show a substantial compliance with all its requirements. Much of the evidence on this point was so vague and indefinite, and mere impressions not within the personal knowledge of the witnesses, that it cannot be said that the posting of any such notices in the manner required was conclusively or even satisfactorily proved anywhere except in the sleeping-room occupied by plaintiff. No actual notice was brought home to plaintiff. Under these circumstances, defendant cannot complain that the court left it to the jury to determine from the evidence whether he had posted notices as required by the statute.

Order affirmed.

QUESTIONS

1. Suppose that the defendant had shown that the owner of the property had also brought an action against him for the loss of the scarfpin, what would have been the decision in this case?

2. The plaintiff was permitted to recover the full value of the pin. To whom does this money belong?
3. D hires property to P for six months. At the end of three months D retakes his property without P's consent. P sues D in trover for conversion of the property. What decision?
4. If P is permitted to recover in the foregoing case, what will be the measure of his damages?
5. P is in possession of X's automobile. Through the negligence of D the machine is badly injured. (*a*) What are P's rights against D? (*b*) What are X's rights against D?
6. P is in possession of X's horse. T steals the horse from P. (*a*) What are P's rights against T? (*b*) What are X's rights against T?

c) *Termination of the Relation*

The final question to be considered is as to the manner in which the relation of bailor and bailee may be terminated. It has been seen that the essential feature of the creation of a bailment is the delivery of possession of the subject-matter of the bailment to the bailee for a specific object or purpose. The essential feature of the termination of the relation is the resumption of control, or the right to resume control, by the bailor over the subject-matter.

As intimated in the foregoing paragraph, the legal effect of the termination of the relation is to restore to the bailor his former powers over the subject-matter of the bailment. The termination of the relation entitles the bailor to immediate possession of his property or the immediate power to direct its disposition. Failure to return the property by the bailee on the demand of the bailor after the termination of the relation constitutes a conversion of the property for which the bailor can recover his proper damages in an action of trover.

The relation, when it is created for a definite time by the agreement of the parties, ceases upon the expiration of that time. A engages a horse from B for a period of thirty days; upon the expiration of the thirty days, the relation between A and B comes to an end and B is entitled to immediate possession and control of his property.

A bailment created for a specific purpose or object is terminated by the accomplishment of the purpose or object for which it was created. A pledges ten shares of stock with B to secure the payment of a debt which the former owes the latter; upon the payment of the debt, or, as for that matter, upon a valid tender of the amount of the debt, by A, the relation of pledgor and pledgee ceases, and A is entitled to the return of his stock.

The bailment relation may always be terminated by a mutual agreement of the parties. A voluntary return of the property by the bailor, with intent to terminate the relation and with the assent of the bailee, necessarily brings the bailment to an end. Moreover, an agreement between the bailor and the bailee for a return of the subject-matter of the bailment has the same legal effect. The promise of the bailor to receive the property is a sufficient consideration to support the bailee's promise to return it.

As a general rule, a bailment, arising out of a contract between the parties, cannot be terminated by the act of the bailor. Possession of the property under the contract gives the bailee a special property in the subject-matter, and he is protected by law in this special property against everyone, including the bailor, during the time agreed upon by the parties for the continuance of the relation. An exception to this rule is found in a bailment of goods on which the bailee is to make repairs. In this situation, it is generally held by the courts that the bailor can prevent the bailee from making or from continuing to make the repairs. Of course, this conduct on the part of the bailor is a breach of the contract between the parties for which the bailee is entitled to collect damages.

The bailee is always in a position to terminate the relation, even when it arises under a contract, by refusing to continue in possession of the subject-matter of the bailment. The law does not possess adequate machinery for compelling the bailee under such circumstances to continue in possession of the *res* and to continue the performance of his promise in respect thereto; the law can only say that the bailee, if he does not perform his promise, must pay such damages as the bailor may suffer by reason of the breach of contract.

A bailment for the sole benefit of the bailor is terminable at the pleasure of the bailor. Since a bailment of this type is for the sole benefit of the bailor, the bailee has no legal interest in its continuance and cannot complain that the bailee has terminated it prematurely. On the other hand, a bailee, who enters upon the performance of a bailment for the sole benefit of the bailor, comes under a legal obligation to perform his promise, even though he will receive no compensation for his services. The foregoing rule, however, does not apply where the bailment is for an indefinite period of time or for an indefinite object; in these cases the bailment relation may be rightfully terminated by the bailee at will.

A bailment for the sole benefit of the bailee is terminable at the pleasure of the bailee. The bailor cannot legally insist upon the

continuance of a relation which is for the sole benefit of the bailee. On the other hand, if the bailment is for a definite period of time or for a definite object, the bailor cannot terminate the relation without the consent of the bailee; the bailee under such circumstances gets a special property in the subject-matter of the bailment in which he is protected by law against everyone, including the bailor; if, however, such a bailment is for an indefinite time or for an indefinite object, it may be terminated by the bailor at will.

Any wrongful act of the bailee in connection with the use or possession of the subject-matter of the bailment, although not per se a termination of the relation, gives the bailor a power to terminate it. If the bailee misuses or abuses the property, or deals with it contrary to the understanding of the parties, the bailor, if he wishes, may terminate the relation and demand immediate possession or control of his property.

The destruction of the subject-matter of a bailment for obvious reasons terminates the relation regardless of the agreement of the parties. There can be no relation of bailor and bailee except in terms of something held in bailment; therefore, when the subject-matter of an existing bailment is destroyed, the relation ceases by operation of law.

It is usually said that the death of the bailor terminates a bailment which is for his sole benefit, and that at his death his personal representative is entitled to immediate control over the property in question. The death of the bailee likewise terminates the relation where the bailment for an indefinite time or for an indefinite object is for the sole benefit of the bailee. In any event, the death of the bailee terminates the relation, if the bailor, in entering into the relation, trusted the special skill of the bailee or reposed special confidence in him. In other cases, neither the death of the bailor nor the death of the bailee terminates the relation. In the event of the death of the bailor, the special property of the bailee in the subject-matter is not affected and the relation continues thereafter between the bailee and the personal representative of the deceased bailor. When the bailee dies, his special property in the subject-matter survives to his personal representative, and the relation thereafter continues between the bailor and the personal representative of the deceased bailee.

As a general rule, neither the bankruptcy of the bailor nor the bankruptcy of the bailee terminates the relation. However, the bankruptcy of the bailor in a bailment for the sole benefit of the bailor will terminate the relation and entitle his assignee in bankruptcy to

the immediate possession of the property; the bankruptcy of the bailee in a bailment for the sole benefit of the bailee, if for an indefinite time or for an indefinite object, will terminate the relation; bankruptcy will have the same legal effect in those cases where the bailor, in entering into the relation, trusted the special skill of the bailee or reposed special confidence in him. In other cases the continuance of the relation for the agreed time is not affected by the bankruptcy of either party. If the bailor becomes bankrupt, the bailee having a special property in the subject-matter of the bailment is entitled to it against the assignee in bankruptcy as well as against the bailor himself. In the event that the bailee becomes bankrupt, the special property of the bailee passes to his assignee to be administered for the benefit of his creditors.

QUESTIONS

1. (*a*) P loans property to D for six months. (*b*) He hires it to D for six months. (*c*) He pledges it to him for the same period. When does the bailment relation cease in each case?
2. (*a*) P loans a horse to D to make a trip to X and back. (*b*) He hires the horse to D until the latter shall have finished cultivating his crop. (*c*) He pledges it to D until P shall have paid a debt which he owes to D. When does the relation cease in each case?
3. In the foregoing case, P and D mutually agree that the relation shall cease sooner than was contemplated by the original agreement. What is the effect of the agreement? Is the agreement binding?
4. Suppose that the subject-matter of the bailment is destroyed before the object of the bailment has been accomplished. What is the effect of its destruction upon the relation?
5. P pledges stock with D to secure a debt. D without P's consent pledges the same stock to X. What is the effect of D's conduct on the relation?
6. P hires his automobile to D for six months for the latter's personal use. (*a*) D hires it to X for a week. (*b*) D grossly abuses the property. What is the effect of D's conduct on the relation?
7. D gratuitously undertakes to care for P's automobile for six months. (*a*) Before the expiration of the six months P demands the return of his property. D refuses to return it. (*b*) Before the expiration of six months D notifies P that he will care for the property no longer. What is the liability of D, if any, to P under each hypothesis?
8. (*a*) D dies before the expiration of the six months. (*b*) He becomes insolvent before the expiration of the six months. (*c*) P dies at the end of three months. (*b*) P becomes insolvent at the end of three months. What is the effect of each event on the relation?

9. P gives D the gratuitous use of property for six months. (*a*) Before the end of the six months P demands possession of his property. Is he entitled to it? (*b*) Before the end of the six months D notifies P that he is returning the property. Is he entitled to do so?
10. Would your answer in No. 9 be the same if the bailment had been for an indefinite period? Would your answer to No. 7 be the same if the bailment had been for an indefinite period?
11. In No. 9, what would be the effect of the death of the bailor before the end of the six months? death of the bailee? bankruptcy of the bailor? bankruptcy of the bailee?
12. P hires the use of his automobile to D for six months. At the end of three months, (*a*) P dies; (*b*) P becomes bankrupt; (*c*) P demands possession of the machine. What is the effect of each fact upon the relation?
13. In the foregoing case, at the end of three months, (*a*) D dies; (*b*) D becomes bankrupt; (*c*) D returns the car to P's garage without his consent. What is the effect of each fact upon the relation?
14. P and D enter into a contract by which D agrees to take possession of P's machine and paint it. Before the job has been completed, (*a*) P dies; (*b*) P becomes bankrupt; (*c*) P orders D to cease work on the car and to return it. What is the effect of each fact on the relation?
15. Before the job has been completed, (*a*) D dies; (*b*) D becomes bankrupt; (*c*) D refuses to paint the machine and returns it to P. What is the effect of each fact on the relation?
16. P pledges ten shares of stock with D to secure a debt which P owes to D. Before the debt is paid, (*a*) P dies; (*b*) P becomes bankrupt; (*c*) P demands possession of his stock. What is the effect of each fact on the relation?
17. Before the debt is paid, (*a*) D dies; (*b*) D becomes bankrupt; (*c*) D returns the stock to P. What is the effect of each fact upon the relation?

3. Sales and Contracts to Sell[1]

Formation of the Contract

I. IN GENERAL

LOW *v.* PEW

108 Massachusetts Reports 347 (1871)

This was an action of replevin by the firm of Alfred Low & Company of a lot of flitched halibut from the assignees in bankruptcy of the firm of John Low & Son, all of Gloucester.

[1] In connection with the study of the cases herein presented, the student should consult the Uniform Sales Act, Appendix A, p. 602.

On April 17, 1869, as the schooner Florence Reed, owned by John Low & Son, was about to sail from Gloucester on a fishing voyage, that firm signed and gave the plaintiffs a writing by which "we, John Low & Son, hereby sell, assign, and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner Florence Reed on the voyage upon which she is about to proceed."

In July, 1869, proceedings in bankruptcy were begun against John Low & Son, in which they were adjudged bankrupts on August 6, and on August 20 these defendants were appointed the assignees in bankruptcy and the deed of assignment was executed to them. On Saturday, August 14, the Florence Reed arrived at port on her home voyage. On Monday, August 16, the United States marshal took possession of the vessel and cargo under a warrant issued to him on August 6, in the proceedings in bankruptcy, and transferred his possession to the defendants upon their appointment. The plaintiffs demanded possession of the catch from the defendants and offered to pay the agreed purchase price. The defendants refused to deliver possession. Thereupon the plaintiffs brought this action in replevin for possession of the catch.

MORTON, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. *Williams* v. *Merrit*, 103 Mass. 184. The firm could not by a subsequent sale and delivery transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case, therefore, is whether a sale of halibut afterward to be caught is valid so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time mortgage is made, though he afterward acquires them, is void. *Jones* v. *Richardson*, 10 Met. 481.

It is equally settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another, or the crops to grow upon his own land, but not upon land in which he has no interest. 2 Kent's *Commentaries* (10th ed.), 468, (641) note *a*. *Jones* v. *Richardson*, 10 Met. 481. *Bellows* v. *Wells*, 36 Verm. 599. *Van Hoozer* v. *Cory*, 45 Barb. 9. *Grantham* v. *Hawley*, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In *Mulhall* v. *Quinn*, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In *Hartley* v. *Tapley*, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut, but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish, and that the sale to the plaintiffs was void.

Judgment for the defendants.

QUESTIONS

1. What was the issue in the principal case? How was it decided? What rule of law can be deduced from the decision?

2. Even if there was not a sale of the fish in this case, was there not a contract to sell? What is the distinction between the two transactions? What practical difference did it make in the case whether it was the one or the other?
3. D contracts to sell corn to P. P sues him for breach of the contract. D pleads that the agreement was void because he had no corn at the time he entered into the agreement. What decision?
4. X executed to P a chattel mortgage on a crop of corn before it was planted. When the corn was maturing it was attached by D for C, a creditor of X. What are the rights of P, if any, against D?
5. It is said that the ordinary principles of law governing the formation of simple contracts govern the formation of sales transactions. What is meant by this?
6. D, intending to order 5 tons of coal from P, by mistake ordered 50 tons. P tendered delivery of 50 tons, but D would accept only 5 tons. P sues D for the price of 50 tons. What decision?
7. P found a stone and carried it to D, a jeweler, for examination. Neither knew the value of it. D offered P $1 for it which P accepted. It turned out that the stone was worth about $700. P sues D for the return of the stone. What decision?
8. X represents himself to P as Y and asks to buy goods on credit. P does not know Y personally but knows by reputation that he is a man of credit. P delivers the goods to X who sells them to D, a bona fide purchaser. P sues D for the return of the goods. What decision?
9. In the foregoing case, suppose that the facts were the same except that the transaction took place by mail, would the decision be the same?
10. P offered to sell new oats to D, knowing that D wanted old oats. D accepted the offer thinking that he was buying old oats. P tendered new oats in performance of the contract which D refused to accept. P sued D for the price of the oats. What decision?

NIXON *v.* BROWN

57 New Hampshire Reports 34 (1876)

This was an action in trover for a horse. The action was sent to referee who reported the following facts: One Mason purchased the horse in question from one Hubbard for the plaintiff who furnished the money ($95) to Mason to pay for the same. Mason did not disclose to Hubbard that he was acting for the plaintiff and secured from the latter a bill of sale to the horse in his own name. Mason informed the plaintiff that he had made the purchase and showed him the bill of sale. At the time, the plaintiff did not demand the bill of sale but it was understood that Mason was to bring the horse

around to the plaintiff a few days later. This Mason failed to do. Instead, he exhibited the bill of sale to the defendant, represented that the horse was his own, and induced the defendant to buy the animal. Mason received $75 from the defendant and left for parts unknown.

Both parties moved for a judgment on the report of the referee and the court ordered judgment for the plaintiff, to which the defendant excepted, and thereupon took this appeal.

LADD, J. I am of opinion that the defendant's exceptions in this case must be sustained, and that judgment should be entered in his favor upon the report of the referee. The general rule, that the possession of goods by a bailee or servant gives him no power to make any disposition of them, except by virtue of actual authority received from the owner (PERLEY, J., in *Folsom* v. *Batchelder*, 22 N. H. 51), is so well settled as to be quite elementary. But there are several exceptions to this rule, quite as well settled, and quite as well understood as the rule itself. One relates to money, bank bills, checks, and notes payable to the bearer, or transferable by delivery. The cases establishing this exception, commencing, perhaps with *Miller* v. *Race*, 1 Burr. 452, are very numerous, and quite uniform. Another exception, in England, relates to sales in market overt. But as we have no markets overt in this state (*Bryant* v. *Whitcher*, 52 N. H. 158), that exception has no existence here. Another is where the possession of the bailee, from the nature of his employment, implies an authority to sell, as, when goods are left with an auctioneer, or factor, a sale by such bailee, though he had no actual authority, will bind the owner. PERLEY, J., in *Folsom* v. *Batchelder*, *supra*, page 51, and cases cited. The reason given for this last exception is, that the owner has allowed the bailee in possession to hold out the appearance of an authority to sell, which would deceive and defraud the fair purchaser if the law allowed the validity of the sale to be questioned. This statement of the reason, thus clearly and succinctly given by the late CHIEF JUSTICE PERLEY, suggests the ground of my decision in this case. The facts, specially stated by the referee, show most clearly to my mind that the plaintiff allowed Mason, while he retained possession of the horse, to hold out the appearance of ownership in himself, and so of an authority to sell, which would deceive and defraud a fair purchaser if the law permitted the validity of the sale to be questioned.

The plaintiff's counsel undertakes to avoid the application of this just and wholesome rule by saying that the taking of the bill of sale

by Mason in his own name was not the plaintiff's act, and this is true. Mason bought the horse for the plaintiff, and paid for it with the plaintiff's money. Why he concealed the fact of his agency from Hubbard, and why he took a bill of sale in his own name instead of that of his principal, does not appear; but inasmuch as this was all contrary to the truth of the transaction, it is fair to presume that it was part of the scheme of fraud which he then had it in his mind to perpetrate. So far there was certainly no act of the plaintiff, and nothing to prevent the application of the general rule, which Chancellor Kent says is a maxim alike of the civil and common law, that *nemo plus juris in alium transferre potest quam ipse habet.* 2 Kent's *Commentaries*, 324.

Even if the plaintiff's suspicions were not aroused by the extraordinary circumstance that Mason had taken the bill of sale in his own name, a demand for the bill of sale would either have disarmed his agent of the power to deceive and defraud innocent purchasers, or would have developed a purpose to appropriate the property, which would call for immediate action by the plaintiff to secure himself, as against the rapacity of a thief. Why did the plaintiff suffer Mason to go away with the bill of sale and the horse both in his hands? No answer to this question appears in the case, and no answer at all sufficient to my mind has been suggested in the argument. That act of the plaintiff was, as it seems to me, little, if at all, less significant than if he had himself executed a bill of sale of the horse, and delivered it to Mason along with the animal. At any rate, I see no just reason why, so far as regards the rights of an innocent purchaser, it should not be followed by the same legal consequences.

At the argument Mr. Carpenter put this supposed case: A, having sold his horse to B, delivers the animal, together with a bill of sale running to B, to his servant or agent, to be carried to the vendee. But the servant on the way, finding a customer for the horse, produces the bill of sale, represents himself to be the person there named as purchaser and sells the horse to an innocent third person. Of course there could be no question of the right of the owner to recover his property, under that state of facts, against such innocent purchaser. The cases covering this point are numerous, of which *Saltus* v. *Everett*, 20 Wend. 267, is a good example. In that case it was held that the purchaser of part of a cargo of a vessel was not protected against the claims of the real owner, although the purchase was made under a bill of lading, regular and fair on its face, it appearing

on the trial of the cause that the master of the vessel, in which the goods were originally shipped, had *fraudulently*, at an intermediate port, transshipped the goods into another vessel and procured a bill of lading in his own name, which he transferred to his agents, the vendors.

If the plaintiff had not been informed of the fact that Mason had taken a bill of sale of the horse in his own name and with that knowledge permitted him to go forth clothed with all the *indicia* of ownership and so completely armed for the commission of a fraud, the case supposed in argument and that class of cases of which *Saltus* v. *Everett* has been referred to as the type, might have application. As it is, I think they do not apply at all. I regard this act, or omission, if it should be called an omission, of the plaintiff as decisive of the case, and I am therefore of opinion that there should be judgment on the report for the defendant.

QUESTIONS

1. What theory underlies the decision in the principal case?
2. Suppose that the sale to the defendant had taken place before the plaintiff knew that the bill of sale had been taken in Mason's name, would the court have reached the same conclusion?
3. What is meant by a sale in the *market overt?* Are such transactions recognized in the law at the present time?
4. T stole a watch from P and sold it to B, a bona fide purchaser. P sued B for the watch. What decision?
5. T stole a ten dollar bill from P and passed it to B, who received it for value in good faith. P sued B for the money. What decision?
6. T stole from P a check indorsed in blank and sold it to B, a bona fide purchaser. P sued B for the check. What decision?
7. P shipped goods to T to be sold as agent for P. T received a bill of lading for the goods, indorsed in blank, which he pledged to B, to secure his own personal debt. What are the rights of P against B?
8. T, fraudulently representing that he was solvent, induced P to sell him a horse. T thereupon sold the horse to B. P sued B for the horse. What decision?
9. T stole from P certificates of stock indorsed in blank and sold them to B. P sued B for the stock. What decision?
10. P delivered to T certificates of stock indorsed in blank and authorized T to pledge them to secure a debt which P owed. T sold the stock to B and absconded with the money. P sued B for the stock. What decision?
11. P delivered goods to T for safe-keeping. T sold the goods to B. P sued B for the goods. What decision?

12. Would the decision be the same in the foregoing case if it appeared that T seldom received goods for storing but was primarily engaged in the selling of second-hand furniture?
13. P delivers goods to T, a factor, and directs him to hold them in storage. T sells the goods to B. What decision in an action by P against B?
14. What is a *Factors' Act?* What provisions are usually found in such acts? Whom are they intended to protect?

II. REQUIREMENTS OF THE STATUTE OF FRAUDS

GODDARD *v.* BINNEY

115 Massachusetts Reports 450 (1874)

This was an action of contract to recover the price of a buggy built by the plaintiff for the defendant.

The plaintiff, a carriage manufacturer in Boston, testified that the defendant came to his place of business in April, 1872, and directed the plaintiff to make for him a buggy, and that the plaintiff entered the order in his order-book; the defendants gave directions that the color of the lining should be drab, and the outside seat of cane, and directions as to the painting, and also that the buggy was to have on it his monogram and initials. The sum of $675 was agreed upon as the price. It was to be done in or about four months. The plaintiff immediately began work upon the buggy and made every part, it being painted, lined, and with the initials, as ordered. It was finished by September 15, according to the original order.

On October 14, 1872, the plaintiff made out and sent a bill to the defendant. The defendant after looking at it said he would see the plaintiff soon. The bill was in the plaintiff's handwriting and was kept by the defendant.

On November 9, 1872, this buggy and all the property on the plaintiff's premises were destroyed by fire. After the fire the plaintiff again called on the defendant for payment. The defendant wanted to know if the buggy was insured and said that he would see the plaintiff about it later.

The defendant put in no evidence but contended that the action could not be maintained because the contract was within the statute of frauds and unenforcible because not in writing. The plaintiff contended that the contract did not come within the provisions of the statute and that it was the duty of the defendant upon being notified that the buggy was completed, to take the same away within

a reasonable time, and that not having done so the buggy was at the risk of the defendant when burned.

Upon the evidence, the presiding judge directed a verdict for the defendant, and it was agreed that if the jury would have been authorized to find a delivery and acceptance by the defendant, or if upon the facts stated above the court is of the opinion that at the time of the fire the said buggy was on the premises of the plaintiff at the risk of the defendant, the verdict is to be set aside and judgment entered for $675 and interest for the plaintiff: otherwise judgment on the verdict.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services, and materials and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands) is not a contract of sale within the meaning of the statute. *Crookshank* v. *Burrell*, 18 Johns. 58. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale as substantially contracts for the sale of chattels; and the decision in *Lee* v. *Griffin*, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially to contract for the sale of goods, and therefore is subject to the provisions of the statute. See *Maberley* v. *Sheppard*, 10 Bing. 99; *Howe* v. *Palmer*, 3 B. & Ald. 321; *Baldey* v. *Parker*, 2 B. & C. 37; *Atkinson* v. *Bell*, 8 B. & C. 277.

In this commonwealth a rule avoiding both of these extremes was established in *Mixer* v. *Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case

is not within the statute. *Spencer* v. *Cone*, 1 Met. 283. "The distinction," says CHIEF JUSTICE SHAW, in *Lamb* v. *Crafts*, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making and which, at the time, are not made or finished, it is essentially a contract of sale and not a contract for labor, otherwise, when the article is made pursuant to the agreement." In *Gardner* v. *Joy*, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman* v. *Meigs*, 4 Cush. 497, and *Clark* v. *Nichols*, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, section 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than *Mixer* v. *Howarth*. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart, and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

QUESTIONS

1. The seventeenth section of the English Statute of Frauds provides: "No contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." What is the reason for these requirements? To what extent have they been re-enacted in states of this country?
2. Massachusetts has an act containing provisions substantially the same as those quoted above. Why was the contract in the principal case held not to be within these provisions?
3. Does the seventeenth section of the statute include contracts to sell as well as contracts of sale?
4. Suppose that the buggy had been made upon the defendant's order but that it was of the kind which the plaintiff usually made for his market, would the decision in this case have been the same?
5. Would a New York court have reached the same conclusion on the facts of this case? Would an English court have reached the same conclusion?
6. What is included within the meaning of the words "goods, wares, or merchandise"? Do these words comprehend money? stock? bonds? growing crops? standing timber? severed timber?
7. At an auction, D bids in one article for $10; later he bids in another for $15; and then one for $35. P sues D for the total purchases. D pleads the statute of frauds which, let it be assumed, includes all contracts involving $50 and upward. What decision?

ATHERTON *v.* NEWHALL

123 Massachusetts Reports 141 (1877)

Contract to recover the price of 660 sides of sole leather. At the trial in the Superior Court, before GARDNER, J., it appeared that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Lynn. One of the plaintiffs testified that the defendant Newhall called at their store on Saturday, November 9, 1872, examined some leather, and said he would take "what leather was adapted to his purpose," being leather "light

weight" in thickness, out of a certain lot of about 800 sides which were piled up in the store; and that, after Newhall had gone, he assisted in sorting out the leather intended for the defendants, which was then rolled up into 44 rolls, containing 660 sides, weighed, marked with the defendants' names, and placed near the front door of the store, ready for delivery. It was also in evidence that in the afternoon of the same day an expressman, who was in the habit of calling at the plaintiffs' store for goods for Lynn, called and took six rolls of the leather, containing 90 sides, which was all his wagon could carry, with the goods then on it, but did not deliver them until the Monday following to the defendants, who were regular customers of his; but in this case no order had been given to him by either party. The plaintiffs' store with its contents, including the remaining 570 sides of leather, was burned in the great fire of November 9, 1872. On Monday, November 11, 1872, the defendant Newhall called on the plaintiffs and produced the bill, which he had received from the plaintiffs, for the 660 sides, and requested their bookkeeper to correct the bill so as to correspond with the amount of leather actually received by him, and the bookkeeper thereupon deducted the 570 sides from the bill. On March 20, 1873, he tendered to the plaintiff $394, the amount due for the 90 sides, which they declined to receive.

Upon this evidence, the judge ruled that there was no evidence of any delivery to or acceptance by the defendants of the 570 sides of leather, directed the jury to return a verdict for the price of the 90 sides, and reported the case for the consideration of this court. If the action could be maintained for the whole 660 sides, the verdict was to be set aside; otherwise, judgment was to be entered on the verdict.

Gray, C. J. It is unnecessary to consider whether there was a sufficient delivery to complete the sale, because it is quite clear, upon the authorities, that there was no such acceptance and receipt of part of the goods as would satisfy the statute of frauds. Gen. Sts. c. 105, section 5. Such acceptance must be by the buyer himself, or by someone authorized to accept in his behalf. The acts of the buyer on Saturday did not constitute such an acceptance, because, according to the seller's own testimony, the buyer merely agreed to take all the sides of leather of a certain thickness, which were then set apart by themselves, but formed part of a large pile from which they were afterward to be selected by the seller. *Knight* v. *Mann*, 118 Mass. 143. The receipt of part of the leather by the expressman did not

constitute such an acceptance, because he was not authorized to accept so as to bind the buyer. *Johnson* v. *Cuttle*, 105 Mass. 447. The acceptance by the buyer, on Monday, of the part brought by the expressman was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received. *Townsend* v. *Hargraves*, 118 Mass. 325, 333; *Remick* v. *Sandford*, 120 Mass. 309.

Judgment on the verdict.

QUESTIONS

1. What was the defense upon which the defendant relied in this case?
2. Was there a sufficient delivery in this case to satisfy the requirements of the statute? Was that question in issue? If the court had come to the conclusion that there was a sufficient acceptance, would the question of delivery have been in issue?
3. Why was there not an acceptance of the subject-matter of the sale on Saturday when the defendant came to the plaintiff's place of business?
4. Why was not the receipt of a part of the leather by the expressman a sufficient acceptance? Why was not the receipt of that part of the leather by the plaintiff from the expressman on Monday a sufficient acceptance?
5. B is shown a lot of 156 firkins of butter, and orally agrees to buy the whole lot. The butter is shipped to him by S. S sues for the purchase price. B pleads the statute. What decision?
6. S agrees to sell B 100 unascertained firkins of butter. After receipt of the lot, B opens and sells a small quantity from one firkin. S sues B for the price of the lot. B pleads the statute. What decision?
7. In the foregoing case, B does not sell any of the butter, but retains possession of the whole lot for fifteen days without saying anything. S sues B for the price of the butter. B pleads the statute. What decision?
8. B goes into S's warehouse to buy cotton to be shipped to him in another city. Ten bales are selected which B orally agrees to buy. With B's consent, his name is put on the bales by S. Before S ships the cotton, B notifies him not to do so. S sues B for the price of the cotton. B pleads the statute. What decision?

ELMORE *v.* STONE

1 Taunton's Reports 458 (1809)

This was an action brought to recover the price of two horses which it was contended had been sold to the defendant. The declaration contained one count upon a bargain and a sale, and another upon

a sale and delivery. Upon the trial of this cause at the Middlesex sittings in Trinity term last, before MANSFIELD, C. J., it appeared that the plaintiff, who kept a livery stable and dealt in horses, having demanded 180 guineas for these, the defendant, after offering a less price, which was rejected, at length sent word that "the horses were his, but that, as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff upon this removed them out of his sale stable into another stable. Lens, serjeant for the defendant, contended that, as this was a bargain and sale of goods of greater value than £10, a note in writing was necessary to be proved, because there was no sufficient delivery. Such a constructive delivery as this would not avail he said, to take the case out of the statute. MANSFIELD, C. J., was of the opinion that there was sufficient delivery, but reserved the point, and the jury found a verdict for the plaintiff.

MANSFIELD, C. J. The objection made to this verdict was the want of memorandum in writing of the sale, and of a delivery. I thought at the trial that there was no need of a memorandum in writing, because of the direction given that the horses should stand at livery. They were in fact put into another stable, but that is wholly immaterial. It was afterward argued that this was not a sufficient delivery, but upon consideration we think that the horses were completely the horses of the defendant, and that when they stood at the plaintiff's stables they were in effect in the defendant's possession.

There are many cases of constructive delivery where the price of goods may be recovered on a count for goods sold and delivered, instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is that the key of the warehouse is delivered, or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place. Thus in the present case, after the defendant had said that the horses must stand at livery and the plaintiff had accepted the order, it made no difference whether they stood at livery at the vendor's stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as the owner of the horses, but as any other livery-stable keeper might have them to keep. Under many events it might appear hard if the plaintiff should not continue to have a lien upon the horses which were in his own possession, so long

as the price remained unpaid; but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery, they would on the decease of the defendant have become general assets; and so, if he had become bankrupt, they would have gone to his assignees. The plaintiff could not have retained them, although he had not received the price. Consequently the rule must be discharged.

QUESTIONS

1. Does it appear that there was an acceptance of the goods in this case? Are both receipt and acceptance necessary? Can there be an acceptance without a receipt? Can there be a receipt without an acceptance?
2. The court held that there was a sufficient delivery in this case. Of what did the delivery consist? What does Chief Justice Mansfield mean by the expression *constructive delivery?*
3. B goes to S's store and selects 10 firkins of butter and directs him to ship them at once by the D Company, which S does. B refuses to receive them from the carrier. S sues B for the price of the goods. B pleads the statute. What decision?
4. Suppose that B had not designated the carrier in the foregoing case, would your answer have been the same?
5. S orally agrees to sell a horse to B. B orally agrees to buy the horse and requests S to continue the horse in his pasture for the balance of the season which S agrees to do. In an action by S for the price of the horse, B pleads the statute. What decision?

TOWNSEND *v.* HARGRAVES

118 Massachusetts Reports 325 (1875)

Colt, J. The purpose of this celebrated enactment, as declared in the preamble and gathered from all its provisions, is to prevent fraud and falsehood, by requiring a party, who seeks to enforce an oral contract, to produce, as additional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal, unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is not changed, and the consideration may be recovered. *Stone* v. *Dennison*, 13 Pick. 1; *Basford* v. *Pearson*, 9 Allen, 387; *Nutting* v. *Dickinson*, 8 Allen, 540. The memorandum required is the memorandum of only one of the parties; the alternative acts of the seventeenth section proceed from one only; they presuppose a contract and are in affirmance or partial execution of it; they are not essential to its existence,

need not be contemporaneous, and are not prescribed elements in its formation. It is declared in the fourth section that no action shall be brought upon the promises therein named, unless some memorandum of the agreement shall be in writing, and in the seventeenth that no contract for the sale of goods "shall be allowed to be good," or as in our statute, "shall be good or valid," unless the buyer accepts and receives part or gives earnest, or there is some memorandum signed by the parties to be charged, or, as in our statute, by the party to be charged. It is true there is a difference in phraseology in these sections; but in view of the policy of the enactment, and the necessity of giving consistency to all its parts, this difference cannot be held to change the force and effect of the two sections. "Allowed to be good" means good for the purpose of a recovery under it, and the clause in the last part of the latter section, which requires the memorandum to be signed by the party or parties to be charged, implies that the validity intended is that which will support an action on the contract. We find no case in which it is distinctly and authoritatively held otherwise.

In a recent case in the Queen's Bench, a memorandum in writing by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute, and no notice is taken of the fact that the goods were not in existence when the memorandum was furnished. *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140.

QUESTIONS

1. Action by S on a contract, evidenced by a written memorandum, signed by B. B objects to the memorandum on the ground that it was not given until a month after the transaction had been entered into. What decision?
2. Precisely what does the statute of frauds say on this point?
3. Examine the statute of some state in which you are interested and make a brief digest of its statute of frauds.
4. Do you think that on the whole the requirements of the statute of frauds are wise and wholesome?

OGLESBY COMPANY *v.* WILLIAMS COMPANY

112 Georgia Reports 359 (1900)

Action for damages alleged to have been sustained by the plaintiff, Oglesby Grocery Company, by reason of the breach by the defendant, Williams Manufacturing Company, of an alleged contract for the

sale to the plaintiff of 200 half-barrels of "pure Georgia cane syrup" at 23 cents per gallon. It was alleged that the contract was in writing and signed by the Williams Manufacturing Company, and that a copy of the same was attached to the petition as an exhibit:

"Williams Manufacturing Company, Columbus, Ga.
"200—½Barls. Ga. Cane, 23.

"Dec. 1, 1899, (Signed) Williams Mfg. Co."

The defendant demurred to the petition on the ground that it appeared therefrom that the alleged contract was within the statute of frauds, and "no memorandum in writing sufficient to bind this defendant was entered into between the parties," and that "there was no such part performance or payment of earnest money to bind the bargain as is required by the statute of frauds." The court sustained this demurrer and the plaintiff excepted.

Fish, J. The defect on which counsel for defendant in error rely is that the memorandum "failed to disclose the name of the purchaser, or to designate him" so "that he could be identified." They therefore contend that the memorandum is not sufficient to take the alleged contract out of the statute of frauds. This position is well taken. Granting that this meager memorandum is sufficient in other respects to meet the requirements of the statute of frauds, it fails to set forth a contract, because it does not show or describe who the parties to the contract are.

It takes two parties to make a contract, and a writing which names only one party, and does not in any manner indicate who the other party is, does not set forth a contract.

It is well established that where the statute requires the contract to be in writing, there can be no binding contract unless both parties thereto are named in the writing, or so described therein as they may be identified. In Benjamin on *Sales*, 7th American (Bennett's) ed., section 231, it is declared that "it is settled to be indispensable that the written memorandum should show not only who is the person to be charged but also who is the party in whose favor he is charged." We can well apply to this case the language used by Sir James Mansfield, C. J., in the leading English case decided in 1805, where the memorandum was signed by the vendor, who was the defendant, but the name of the purchaser did not appear therefrom. "How can that be said to be a contract or memorandum of a contract which

does not state who are the contracting parties? By this note it does not appear to whom the goods were sold. It would prove a sale to any other person, as well as to the plaintiff." *Champion* v. *Plummer*, 1 Bos. & P. N. R., 252.

While the statute does not in express terms require that both parties shall be named or described in the writing, such is its legal effect. It requires the *promise* to be in writing. There can be no promise without both a promisor and a promisee, and the promise is not in writing, unless the writing shows in some way, who the promisee is. The memorandum relied upon in the present case does not even indicate the existence of a promisee. In a leading American case (*Grafton* v. *Cummings*, 99 U.S. 100), the Supreme Court of the United States held,

> That in order to satisfy the requirements of the statute of frauds of New Hampshire, the memorandum in writing of an agreement for the sale of lands, which is signed by the party to be charged, must not only contain a sufficient description of them, together with a statement of the price to be paid therefore, but in that memorandum, or some paper signed by that party, the other contracting party must be so designated that he can be identified without proof.

The statute of New Hampshire which the court had under consideration did not expressly require that the names of both parties to the contract should appear in the writing. It provided that "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof is in writing, signed by the party to be charged, or by some person by him authorized thereto by writing." Mr. Justice Miller, delivering the opinion of the court, said:

> The statute not only requires that the agreement on which the action is brought or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it.

The courts below committed no error in sustaining the demurrer to the plaintiff's petition.

Judgment affirmed.

QUESTIONS

1. What requirements are laid down by the decision in this case for the sufficiency of the written memorandum? Must the parties be named? Must the promise appear?
2. Must the subject-matter of the transaction appear in the written memorandum? Must the consideration of the contract appear?
3. Action by S on a promise of B, evidenced by the following memorandum: "Sold to B ten tons of coal at $10 a ton. (Signed) S." What decision?
4. Suppose that B had been suing S in the foregoing case and had offered the same memorandum in evidence, what would have been the decision?
5. B brings action for breach of contract and offers in evidence the following memorandum: "Sold ten horses to B. (Signed) S." What decision?
6. Action by S on a contract, to prove which he offers a memorandum in evidence, purporting to be signed by A, agent for B. B contends that the memorandum is not sufficient because A did not have authority in writing to sign the memorandum. What decision?
7. Action by S on a contract, evidenced by a written memorandum, signed by A for S and B. B objects to the sufficiency of the memorandum on the ground that A was auctioneer and agent for S. What decision?
8. Action by S against B on a contract, evidenced by a memorandum, signed by S, acting as agent for B. B objects to the sufficiency of the memorandum. What decision?

b) Passing of Title under the Contract

TARLING *v.* BAXTER

6 Barnewall & Creswell's Reports 360 (1827)

Assumpsit to recover back £145 paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered, and bargained and sold. At the trial before ABBOTT, C. J., at the London sittings after Hilary Term, 1826, a verdict was found for the plaintiff for £145, subject to the opinion of this court on the following case:

On the fourth of January, 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note signed by the defendant, and delivered to the plaintiff, was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the

fourth day of February next, and to be allowed to stand on the premises until the first day of May next." And the following note was signed by the plaintiff and delivered to the defendant. "I have this day agreed to buy of Mr. John Baxter, a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the fourth day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4, 1825." At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, S. Baxter, on the eighth of the same month of January, took a bill of exchange for £145 to the plaintiff drawn upon him by the defendant, dated the fourth of January, 1825, payable one month after date, which the plaintiff accepted. The defendant afterward indorsed it to George Baxter, and the plaintiff paid it to one Taylor, the holder, when it became due. The stack of hay remained on the same field entire until the twentieth of January, 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire the plaintiff applied to the defendant to know what he meant to do when the bill became due, the defendant said: "I have paid it away, and you must take it up, to be sure. I have nothing to do with it; why did you not remove the hay?" The plaintiff said "he could not because there was a memorandum 'that it should not be removed until the bill was paid'; would you have suffered it to be removed?" and the defendant said, "Certainly not." The defendant's set-off was for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the court was, whether the plaintiff under the circumstances was entitled to recover the sum of £145, or any part thereof.

Bayley, J. It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is, in whom the property in this hay was vested at that time. By the note of the contract delivered to the plaintiff, the defendant agreed to sell the plaintiff "a stack of hay standing in Canonbury Field, at the sum of £145, the same to be paid for on the fourth day of February next, and to be allowed to stand on the premises until the first day of May next." Now this was a contract for an immediate, not a prospective, sale. Then the

question is, In whom did the property vest by virtue of this contract? The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee. The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price. The rule of law is that, where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that, if it is destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is that the parties intended an immediate sale, and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit must therefore be made absolute.

QUESTIONS

1. What was the issue under consideration in this case? How was it decided? What rule of law can be deduced from the decision?
2. If title to the property passed when the agreement was entered into, what security did the seller have for the payment of his purchase price?
3. Suppose that the parties had agreed that title should not pass until the purchase price had been paid, upon whom would the loss have fallen in this case?
4. In this case, the parties had not expressly agreed when title should pass. What is the justification for concluding that title passed when the agreement was made?
5. Is payment of the purchase price necessary to the passing of title? Is delivery of the subject-matter necessary?
6. Under the doctrine of this case, when will title to personal property pass at the time of the formation of the contract?
7. Is the doctrine of this case adopted by the American Sales Act?

WILSON *v.* COMER

125 Georgia Reports 500 (1906)

Wilson & Wallace brought trover against W. T. Comer, for certain lumber. On the trial of the case Wallace testified as follows:

> He [Comer] told me to ship the lumber and file the bill of lading in the Lowry National Bank. I told him I didn't do any business with any bank, and it would be trouble to me, and would be less trouble for me to ship the lumber to him and for him to mail me a check at once. He said, very well. There was something said about mailing the check on receiving the lumber, and I told him when he received the lumber to mail me a check for the same at once. He said he would do it. That was the contract of sale. I have never received the check. My firm has not received the check for that lumber.

Wallace further testified as to his efforts to collect the amount due. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, upon the ground that the transaction was an ordinary sale, title had passed, and trover for the lumber would not lie. This motion was granted. The plaintiffs excepted.

Cobb, P. J. The sole question in this case is whether title to the lumber passed to the defendant, or whether it remained in the plaintiffs until the check was received in payment of the lumber. If title passed, trover would not lie, and a nonsuit was properly granted. "If personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer." *Bergan* v. *Magnus*, 98 Ga. 514, and cit. The transaction in this case was clearly a cash sale, and no title passed to the defendant. The granting of a nonsuit was therefore erroneous, and the judgment is reversed.

QUESTIONS

1. The court said that the transaction in this case was clearly a cash sale. What does the court mean by a cash sale?
2. S agrees to sell a horse to B and informs B that he can have the horse when he pays the purchase price. Before the purchase price is paid, the horse, still in S's possession, dies. S sues B for the price agreed upon. What decision?
3. B, a stranger to S, goes into the latter's store and bargains for a pair of shoes. The clerk wraps up a pair and hands them to B. B walks

out with the shoes without paying the price of them. What are S's rights against B?

4. S agrees to sell ten head of cattle to B. S tells B that he would like to have his money before surrendering possession of the cattle. B replies that he will send a check covering the amount as soon as he gets home. On the way home, B sells the cattle to D, a bona fide purchaser and absconds. S sues D in replevin for his cattle. What decision?
5. What provisions, if any, are found in the Sales Act, governing cash transactions?

ALLEN *v.* ELMORE

121 Iowa Reports 241 (1903)

Action for purchase price of a quantity of hay sold at public auction to the defendant. Trial by the court without a jury. Judgment for plaintiff. Defendant appeals. Affirmed.

McClain, J. At an auction sale of plaintiff's stock and farm produce certain hay in a mow was offered, with an announcement that it would be sold in five-ton lots, with the privilege to the successful bidder for any lot of taking a larger quantity at the same price, if he should see fit. Under this arrangement defendant was the successful bidder for the first lot, and announced his election to take all of the hay offered at the same price. Some question was raised as to how the quantity should be ascertained, and it was agreed that it might be weighed, as taken away, on a neighbor's scales, and, further, that the buyer might allow it to remain in plaintiff's mow until the same was needed for the storing of the next crop. The buyer paid a portion of the purchase price in cash, and by the terms of the sale he was to have time for payment of the balance. Before any of the hay was removed it was destroyed by accidental fire, without any fault on the part of the plaintiff. Under these facts, the simple question was whether the title to the hay had passed, so that the defendant as purchaser became liable for the price.

The only objection made by counsel for appellant with reference to his liability is based on the fact that the quantity of hay had not been ascertained at the time of its destruction, and that weighing was still necessary to determine the purchase price to be paid. It is true that so long as anything remains to be done between the parties to ascertain and identify the particular property which is to pass, the sale is not complete. But if the property has been identified so that the transaction relates to a specific and ascertained chattel, then

the question is one of intent, and the fact that something remains to be done by the buyer, such as weighing or measuring, for the purpose of determining the price to be paid, does not prevent the transaction being a completed sale, under which the title passes to the buyer, accompanied with the risk of loss or destruction of the property without the seller's fault. The rule supposed to have been recognized in some of the earlier English cases, to the effect that there could be no passing of title until the purchase price had been definitely determined by weighing or measuring, when necessary, based, as it was, apparently on the idea that the action for the purchase price must be for a specific sum, definitely ascertained, has not been generally approved by the courts in this country, and it has been held by the great weight of authority that where the payment of the purchase price is not a condition to the passing of title—that is, where credit for the price is given—the fact that weighing or measuring still remains necessary to determine the price will not indicate an intention that the title shall not pass until such acts are done; it being assumed, of course, for the purpose of applying this rule, that the specific goods are definitely ascertained and agreed upon. *Upson* v. *Holmes*, 51 Conn. 500; *Sanger* v. *Waterbury*, 116 N.Y. 371; *Adams Mining Co.* v. *Senter*, 26 Mich. 73; *Ober* v. *Carson's Executor*, 62 Mo. 209; *Sedgwick* v. *Cottingham*, 54 Iowa, 512. And, whatever may have been the earlier view of the English judges, that is now the rule in England. *Martineau* v. *Kitching*, L.R. 7 Q.B. 436. This is the view stated by the American textbooks. See Mechem on *Sales*, sections 519–24; Burdick on *Sales*, page 55.

Even if, as stated in some cases, the question is one of intent, for the jury we have in this case the conclusion of the trial court, entitled to the same weight as the verdict of a jury, that such was the intent, and the finding is amply supported by the evidence. It is perfectly clear from the record that the hay was allowed to remain in the plaintiff's mow for the convenience of the defendant; that the defendant had the right to take it away whenever he saw fit; that he might, under the terms of the contract, have taken it away before its destruction and before payment of the balance of the price; and that weighing to ascertain the amount to be paid was to be done by him as the hay was removed. It is true that, by the destruction of the hay before its removal and weighing, the ascertainment of the quantity by weighing was rendered impracticable; but, the sole question being as to the amount to be paid, the quantity must be ascertained by the best

evidence available, and there was evidence from which the trial court was able to determine the quantity and fix the amount to be paid.

The judgment of the trial court was correct, and it is affirmed.

QUESTIONS

1. The court held in this case that title to the hay passed upon the making of the agreement. Is this a conclusion of fact or of law?
2. S agrees to sell B 1,500 pounds of seed cotton from a larger mass, at 10 cents a pound, to be weighed by S and B jointly. Before the cotton is weighed, the whole mass is destroyed by fire. S sues B for the price of 1,500 pounds of seed cotton. What decision?
3. S agrees to sell B the whole of a mass of seed cotton at 10 cents a pound, to be weighed by S. Before the weighing is done, the cotton is destroyed. S sues B for the price of the mass. What decision?
4. It is agreed that the cotton shall be weighed by B. When does title pass?
5. It is agreed that the cotton shall be weighed by X, a third person. When does title pass?
6. How can it be said that there was a contract in the principal case until the purchase price was agreed upon by the parties?
7. Does the Sales Act contain any provision governing a situation like the one under consideration in the principal case?

BALLANTYNE *v.* APPLETON

82 Maine Reports 570 (1890)

Libbey, J. This is trover to recover the value of thirty-six cords of poplar wood, which the defendant took and sold as the assignee in insolvency of the Lincoln Pulp and Paper Company. The issue involved between the parties is whether as between the plaintiff and the company the title to the wood had passed to the company, or remained in the plaintiff.

It was hauled by the plaintiff and piled up on the lands of the company in December, 1886, and in January, 1887, under a written contract between the parties, the material part of which reads as follows:

R. R. Ballantyne agrees to furnish and deliver on the company's land at mill in Lincoln, one hundred and twenty-five cords peeled, green, poplar wood, to be cut four feet long from point to scarf and generally cleft; to be sound and merchantable; to contain no logs unsplit larger than seven inches in diameter, and no sticks larger than seven by eight inches, no small wood less than three inches in diameter, when peeled. All to be delivered by

the first day of May next. Said wood to be well peeled, knotted, cleaned, and fitted for the chipper, and to be well piled, bottom tiers to be protected. Said wood shall be surveyed by some competent surveyor, when so peeled, to be appointed and paid for by said company. And it is further agreed that a deduction shall be made in the survey for wood cut short, and for decayed, crooked, and small wood. And the party of the first part agrees to pay therefore at the rate of four dollars per cord when said wood shall be delivered and surveyed as aforesaid.

The plaintiff commenced hauling his wood, in performance of the contract in December, 1886; and as he hauled it, piled it upon the land of the company at a point designated by the company's agent. When he learned of the insolvency of the company in January, he went to the company's office and informed its agent, whom he found there, that he did not wish to have the wood scaled, and that he claimed it as his. And to that, the agent replied, "All right." The wood hauled was never scaled by any surveyor; nothing was paid for it, and no part of it was used by the company.

Upon these facts, we think the title did not pass to the company under the contract between the parties. The general rule of law applicable to cases like this is, "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benjamin, *Sales*, Vol. I, Book I, chap. iii, section 360. *Houdlette* v. *Tallman*, 14 Maine, 400.

Sometime the facts of the case may take it out of this rule; but we discover nothing in this case which should do so. From the language of the contract, we think it must be held that the parties contemplated that all the various acts mentioned therein should be done and the wood paid for before the title passed to the purchaser. It was to be surveyed according to the terms of the contract by a competent surveyor. The quantity could be ascertained only by measurement. But a mere survey by measurement would not comply with the terms of the contract. The duty of the surveyor would require him to inspect the wood carefully and determine whether it complied with the terms of the contract in kind, quantity, and dimensions, and to determine what deduction should be made if any portion of it was found not to comply with the terms of the contract. *Berry* v. *Reed*, 53 Maine, 487. And the payment by the purchaser

was to be concurrent with the survey and delivery. None of these conditions had been complied with, nor had they been waived by either party.

Judgment for the plaintiff.

QUESTIONS

1. What was the issue under consideration in this case? How was the issue decided? What rule of law can be deduced from the decision?
2. Suppose that it had been the understanding of the parties that the buyer was to put the wood in deliverable condition, would the decision in this case have been the same?
4. S agrees to sell B ten head of cattle and to fatten them for the market. Before the cattle are fattened, they are attached by D for the creditors of S. B sues D for possession of the cattle. What decision?
5. What provisions, if any, are found in the Sales Act, governing a situation like that in the principal case?

BALLARD *v.* BURGETT

40 New York Reports 314 (1869)

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiffs, entered upon the report of a referee.

Grover, J. The referee finds that the plaintiffs, in the month of October, 1865, sold the oxen in question to one William France for $180, with the agreement that the oxen were to remain the property of the plaintiffs until paid for; that France had never paid the plaintiffs for the oxen; that in April, 1866, said France sold and delivered the oxen to defendant, who purchased without any notice of plaintiffs' claim. The question presented by this appeal is, whether the defendant, by virtue of his purchase of the oxen from France, has acquired title thereto as against the plaintiffs. From the facts found, the defendant must be regarded as a bona fide purchaser from France. The finding of the referee as to the contract between the plaintiffs and France is a little obscure. A sale and delivery of personal property by one person to another, is incompatible with the ownership of such property continuing in the seller. A sale and delivery of personal property always, when consummated, transfers the title from the seller to the purchaser; but the referee expressly finds that the agreement was that the oxen were to remain the property of the plaintiffs until the $180 were paid. It is manifest that the referee did

not intend to find an absolute sale and delivery. The true construction of the finding is, I think that the plaintiffs agreed with France that, when he should pay them $180, they should sell him the oxen, and that until such payment or other termination of the contract, he should have possession, and that they deliver the oxen to him pursuant to this agreement. It is conceded, that under such an agreement, France acquired no valid title to the oxen, and that upon his failure to pay pursuant to the contract, the plaintiffs had as against him a perfect title. But it is claimed that France, although he had no title himself but only the right to acquire title by paying the money, nevertheless by selling to a bona fide purchaser, such purchaser acquired from him a valid title against the plaintiffs. If this be so, this class of cases constitute an exception to the general rule that a purchaser of personal property other than commercial paper acquires no better title than that of his vendor. There are some exceptions to this rule; and it is claimed by the counsel of the appellant that this is one. I can conceive no substantial principle upon which such an exception can be sustained. The possession of the contemplated purchaser gives him no better opportunity to impose upon purchasers than that of an ordinary bailee. In the latter case, it has never been claimed that any title would be acquired by a purchaser from such bailee. Possession by a vendor without title has never been held sufficient to confer a title upon a purchaser from him. Clearly, the existence of an executory contract, by which a vendor not in possession may acquire title upon the performance of some act by him, will not enable him to confer a title upon a purchaser from him. If neither of these facts, separately considered, will enable a vendor to confer title, I am unable to see how such result can be produced by uniting them in a vendor. That is all the basis of the defendant's title. It is insisted by the counsel of the appellant that the title of the purchaser in this class of cases is established by authorities. *Wait* v. *Green* (36 N.Y. 556) is claimed to be directly in point. The opinion of the learned judge would seem to sustain the position of the counsel; but an examination of the facts will show, I think, that the point was not necessarily involved in the decision of the case. The facts as stated are that Catherine Comins sold and delivered a horse to one Billington, and took his note therefor for $100, payable in five months with interest. Directly under the note, and on the same piece of paper was a memorandum, signed by Billington, as follows: Given for one bay horse; the said Mrs. Comins holds the said horse as her

property until the above note is paid. The fair intendment from the foregoing facts is, I think, that Mrs. Comis intended to sell and deliver the horse to Billington, and transfer the title to him, and take back from him security for the payment of the note given for the purchase price in the nature of a chattel mortgage upon the horse. It is clear that had the horse died without fault of Billington, before the payment of the note, such death would have been no defense to an action on the note. The horse was at the risk of Billington. This is a strong, if not the conclusive circumstance, showing the correctness of the foregoing construction of the facts. Not so in the case at bar. Had the oxen died without the fault of France, no action could have been sustained by the plaintiffs for the purchase money. That in no event could be recovered unless the plaintiffs were to give France a title to the oxen unless their ability to do so had been prevented by France. The title of the oxen in the present case was in the plaintiffs, and they were at their risk.

My conclusion, both upon principle and authority, is that the purchaser from France acquired no title, and that the judgment of the Supreme Court affirming that of the referee should be affirmed.

QUESTIONS

1. Why were not the plaintiffs in this case estopped to deny that France had title to the oxen?
2. S sells and delivers a piano to B with the understanding that B is to pay for it by monthly instalments and that no title is to pass until the last instalment has been paid. When five of ten instalments have been paid, B sells and delivers the piano to X. S sues X for possession of the piano. What decision?
3. In the foregoing case, B defaults in the payment of the fifth instalment. What are the rights of S against B?
4. In question 2, it is agreed that the whole sum shall become due in case B makes default in one payment. B defaults in the payment of the fifth instalment. S sues for the whole sum due. While this action is pending, he brings an action for the possession of the piano. What decision?
5. When B defaults in the payment of the fifth instalment, S retakes his piano and thereafter brings an action for the balance of the purchase price agreed on. What decision?
6. S sells and delivers a soda fountain to B. It is agreed between the parties that it shall be paid for in ten equal instalments and that no title shall pass until the last instalment is paid. D defaults after having

made five payments. S retakes his property. What are the rights of B, if any, against S?

7. In the foregoing case, after five instalments have been paid, the fountain is destroyed by an accidental fire. S sues B for the remaining instalments as they become due. What decision?
8. What provisions does the Sales Act contain, if any, governing conditional sales?

HUNT *v.* WYMAN

100 Massachusetts Reports 198 (1868)

Contract on an account annexed for $250 as the price of a horse. Writ dated September 5, 1867. Answer, a general denial.

At the trial in the Superior Court, before MORTON, J., the plaintiff testified that he had a horse for sale, and on the evening of August 12, 1867, the defendant looked at it and inquired the price, and was told $250; that the defendant said nothing further about the price, but asked the character of the horse, and was told the horse was six years old, sound, kind, and afraid of nothing but goats; that the defendant wished to take the horse to try it, and at this the plaintiff hesitated, and the defendant then told him that "if he would let him take the horse to try it, if he did not like it he would return it in as good condition as he got it, the night of the day he took it," to which the plaintiff assented; and that the next day the defendant sent his servant and took the horse from the plaintiff about eleven o'clock in the forenoon.

The plaintiff further testified that the horse was taken for the purpose of trying it; that a short time after it was taken a message was brought him that before it reached the defendant's place, it escaped from the servant, ran away, and was injured; that on receiving the message he went to the stable where the horse was and found it injured so severely that it could not be used or removed prudently; that, on account of the injury, the defendant had no opportunity to try the horse; that he did not expect that the defendant would finally take the horse until after he had tried it; that the defendant had neither returned the horse nor offered to return it; and that the plaintiff had nothing to do with the horse since he put it in charge of the defendant's servant. There was no evidence, and it was not contended by the plaintiff, that the horse was injured by fault of the defendant or his servant.

Wells, J. Upon the facts stated in this case, there was a bailment and not a sale of the horse. The only contract, aside from the obligations implied by law, must be derived from the statement of the defendant that, if the plaintiff "would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it." This contract, it is true, is silent as to what was to take place if he should like it, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like it. In one case the title will not pass until the option is determined; in the other property passes at once, subject to the right to rescind and return.

A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination, by the defendant, of his option to purchase. But it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence.

This action being founded solely upon an alleged sale of the horse for an agreed price, cannot be maintained upon the evidence reported.

QUESTIONS

1. Suppose that the horse had been accidentally hurt while in the defendant's possession, would the decision in this case have been the same?
2. Suppose that through the defendant's negligence the horse, while in his possession, had been hurt, would the decision have been the same?
3. Suppose that the defendant had tried the horse and had failed to return it to the plaintiff within the time agreed upon, what would have been the decision of the court in an action by the plaintiff for the purchase price?
4. S says to B: "Try this machine for ten days and if you do not like it, return it to me." B did not return the machine within the ten days. S is suing B for the price of the machine. What decision?
5. S and B had negotiations over the purchase and sale of a horse. S said to B: "You buy the horse, and if you do not find it satisfactory, return

it." B took the horse home and the following day it died without B's fault. S sued B for the price of the horse. What decision?

6. S sells an automobile to B with the understanding that B may return it if he does not like it after a trial of three days. On the second day, B negligently ran into a grocery store with the machine and on the third day offers to return it in its damaged condition. What are the rights of S, if any, against B?
7. Examine the Sales Act and see whether there are any provisions in it governing "sales on approval" and "sales or return."

KIMBERLY *v.* PATCHIN

19 New York Reports 330 (1859)

One Dickinson had in a warehouse two piles of wheat which together contained 6,249 bushels. Dickinson sold 6,000 bushels to Shuttleworth without then separating the amount sold from the mass. Shuttleworth sold the same amount to the defendant. Later Dickinson sold the whole quantity to a person who in turn sold to the plaintiffs. The defendant got possession of the wheat. The plaintiffs sued the defendant in trover for conversion. The judge, under exceptions by the defendant, directed a verdict for the plaintiffs, which was rendered, and the judgment thereon having been affirmed at General Term, the defendant appealed.

Comstock, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale made by Dickinson to one Shuttleworth on the eighteenth of February, 1845. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of 6,000 bushels of wheat, at 70 cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the 6,000 bushels subject to the vendee's order; of the price, $2,600 was paid down and the residue, $1,600, which was to be paid at a future day, the purchaser afterward offered to pay according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were

specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related was estimated by the parties at about 6,000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was 6,249, being an excess of 249 bushels. When Shuttleworth bought the 6,000 bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6,000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to have an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguished by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title the articles must, if not delivered, be designated so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold,

not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule mentioned above must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: in the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of 6,000 bushels, and Dickinson of the residue, which turned out to be 249 bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of 6,000 bushels and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it, no one could own the wheat and the title would be lost. This would be an absurdity.

But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to 6,000 bushels, and the other to what remained after that quantity was subtracted.

Again suppose, Dickinson having in store and owning 249 bushels, Shuttleworth had deposited with him 6,000 bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the 6,000 bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. Story, *Bailments*, 40; 2 Blackstone, *Commentaries*, 405.

These and other illustrations which might be suggested demonstrate the possibility of a divided ownership in the 6,249 bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question so to deal with each other as to effecuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should henceforth own 6,000 bushels without a separation from the residue. And this I think is precisely what was done. The 6,000 bushels might have been measured and delivered to the purchaser, and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment—resulting in the same mixture as before—most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so.

None of the decisions announce the extreme doctrine that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale, of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale, professing to transfer 6,000 bushels of wheat, but, waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold that same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the 6,000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought and it results that the plaintiffs cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act—that is, the right of taking the portion of the mass which belonged to him—being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the

owner of 6,000 and the plaintiffs of 249 parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

QUESTIONS

1. Suppose that Dickinson had said: "I will sell you the whole quantity at 70 cents a bushel. I think that there are about 6,000 bushels in the two piles." What would have been the effect of the transaction?
2. Under what circumstances is the rule, announced by the principal case, applicable to a transaction?
3. S agrees to sell and B to buy ten steers from a drove of 100 in X's pasture. That afternoon, the whole drove is attached by D to secure satisfaction of a judgment against S in favor of C. B brings an action against D for conversion of ten steers. What decision?
4. S is the owner of brick kilns containing about 100,000 brick. S agreed to sell and B to buy 10,000 "merchantable brick." That afternoon, S sells and delivers all the brick to X. B brings an action against X for conversion of 10,000 brick. What decision?
5. S agrees to sell and B to buy 1,000 gallons of oil from a receptacle, containing 5,000 gallons. Before the oil is drawn for B, the whole quantity is accidentally destroyed by fire. S sues B for the price of 1,000 gallons of oil. What decision?
6. Is the rule of *Kimberly* v. *Patchin* codified by the Sales Act?

SMITH *v.* EDWARDS

156 Massachusetts Reports 221 (1892)

Holmes, J. This case comes before us on the exception of the Old Colony Railroad Company to a ruling of the court below, that it should be charged as trustee of the defendants. The defendants have been defaulted. The bill of exceptions purports to state the evidence introduced on the motion to charge the trustee, but does not disclose the findings of the judge. We assume them to have been the most favorable for the ruling which the bill of exceptions warrants.

The defendants in Ohio ordered of the plaintiffs, who are manufacturers of boots and shoes in Massachusetts, through the plaintiffs' traveling salesman, certain calf and buff shoes, to be made according to a sample shown to the defendants. It was assumed at the argument, and we assume, that the contract bound the defendants, that there is no question under the statute of frauds, and that the shoes

were made according to the sample. They were forwarded over the Old Colony Railroad, we must assume, if it be material, at the defendants' expense, and were delivered to the defendants. This mode of forwarding undoubtedly was authorized by the contract. The defendants accepted the buff shoes, but refused to accept the calf shoes, and shipped the latter back to the plaintiffs by the same railroad. The plaintiffs refused to accept them, sued the defendants for the price of the shoes, and trusteed the railroad company. The calf shoes mentioned are the goods for which the railroad company was charged.

It is argued for the trustees that, although the defendants were guilty of a breach of contract in refusing to accept the calf shoes, yet, as the shoes were not in existence at the date of the contract, they did not become the defendants' property until tendered to and accepted by the defendants after they were made.

Of course the title to the shoes could not be vested in the defendants without their consent. But in the present state of the law it does not need argument to show that a contract can be made in such a way as subsequently to pass the title, as between the parties, to goods unascertained at the time when the contract commits the buyer in advance to the acceptance of goods determined by other marks. *Middlesex Co.* v. *Osgood*, 4 Gray, 447, 449; *Nichols* v. *Morse*, 10 Mass. 523; *Brewer* v. *Housatonic Railroad*, 104 Mass. 593, 595; *Rodman* v. *Guilford*, 112 Mass. 405; *Blanchard* v. *Cooke*, 144 Mass. 207, 227.

In the case of goods to be manufactured, the seller, as he has to tender them, generally has the right to appropriate goods to the contract so far that, if he tenders goods conformable to it, the buyer's refusal to accept them is a breach. The buyer cannot say that he would have accepted some other goods had they been tendered. When goods are to be manufactured and forwarded by a carrier to a buyer at a distance, the seller's delivery of such goods to the carrier as bailee for the purchaser passes the title. The seller cannot forward them until they are specified. The delivery is an overt dealing with the goods as those to which the contract applies, and puts them into a possession adverse to the seller. Although not strictly a delivery, it is an act having the legal effect of a true delivery, which in common legal language it is said to be. *Orcutt* v. *Nelson*, 1 Gray, 536, 543; *Merchant* v. *Chapman*, 4 Allen, 362, 364; *Kline* v. *Baker*, 99 Mass. 253, 254; *Hallgarten* v. *Oldham*, 135 Mass. 1, 9. The act

is required of the seller by the terms of the contract, and thus is assented to in advance by the buyer, on the condition that, as supposed the goods answer the requirements of the contract, and passes the title as we have said. *Putnam* v. *Tillotson*, 13 Met. 517, 520; *Merchant* v. *Chapman*, 4 Allen, 362, 364; *Odell* v. *Boston & Maine Railroad*, 109, Mass. 50; *Wigton* v. *Bowley*, 130 Mass. 252, 254; *Fragno* v. *Long*, 4 B. & C. 219; *Wait* v. *Baker*, 2 Exch. 1, 7.

The present case could be disposed of upon a narrower ground. It would be enough to say that, so far as we can see, the judge who heard the motion to charge the trustee was warranted in finding, as a fact, that the defendants authorized the plaintiffs to appropriate the shoes to the contract, even if the inference was not necessary as matter of law. The question always is what intent the parties have expressed, either in terms or by reasonable implication. *Anderson* v. *Morice*, 1 App. Cas. 713; *Calcutta & Burmah Steam Navigation Co.* v. *DeMattos* 32 L. J. Q. B. 322, 328.

Exceptions overruled.

QUESTIONS

1. When did title to the shoes pass in the principal case? Is this a conclusion of law or of fact?
2. B requests S to manufacture 100 pairs of shoes of a certain description and to ship them by the X Railway Company. S sets aside certain materials from which the shoes are to be made. These materials are accidentally destroyed. Upon whom does the loss fall?
3. In the foregoing case, the shoes have been manufactured, packed, marked with B's name, and are ready for shipping, when they are attached by C, a creditor of S. B sues C for possession of the shoes. What decision?
4. The shoes are shipped by the X Railway Company. They are lost in transit. S sues the carrier for their loss. What decision?
5. S agrees to furnish materials and labor and to build a carriage for B. S completes the work according to specifications and notifies B to come after it. Before B comes, the carriage is accidentally destroyed by fire. S sues B for the price of the carriage. What decision?

WHEELHOUSE *v.* PARR

141 Massachusetts Reports 593 (1886)

This was an action of contract upon an account annexed for goods sold and delivered.

The plaintiff is a tanner, currier, and leather merchant, having his place of business in England. The defendant is a manufacturer

of leather belting in Lowell, in this commonwealth. In 1882, the defendant sent to the plaintiff an order for leather goods, with instructions to "ship to care of D. & C. McIver, shipping merchants, London, as soon as possible, for their next steamer to Boston direct." The order was filled by the plaintiff and the goods were shipped by the Cunard line by D. & C. McIver and were duly received by the defendant. Later in the same year, the defendant sent another order to the plaintiff, in which he said that "as regards the shipping of this leather just received, you have done everything satisfactory. Ship this order in like manner." The plaintiff prepared the goods for shipment and sent them to D. & C. McIver in accordance with the defendant's instructions. When D. & C. McIver received the goods, they wrote to the plaintiff: "The five bales of leather have arrived. Are we to keep them for our steamer sailing 14th inst., or ship by the Glamorgan, which is a very slow steamer sailing 7th inst., and will not, we think, arrive out before our steamer." The Glamorgan was a steamer belonging to the Warren line, for which D. & C. McIver were not agents, and of which steamer they were not the owners. The plaintiff replied: "Send the bales by the steamer which will arrive first." Without further instructions of any kind, D. & C. McIver caused the goods to be shipped by the Glamorgan, which foundered in mid-ocean and the goods were lost. There was no insurance on them. If, upon these facts, the plaintiff could recover, judgment was to be entered for the amount claimed; otherwise for the defendant.

Devens, J. When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser, or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected, the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu*. This proposition assumes that proper directions and information are given to the carrier as to forwarding the goods. *Whiting* v. *Farrand*, 1 Conn. 60; *Quinby* v. *Carr*, 7 Allen, 417; *Downer* v. *Thompson*, 2 Hill, (N.Y.) 137; *Foster* v. *Rockwell*, 104 Mass. 167;

Odell v. *Boston & Maine Railroad*, 109 Mass. 50; *Wigton* v. *Bowley*, 130 Mass. 252.

The defendant had made a purchase of leather in November, previous to the purchase of that the price of which is in controversy, under a direction to the plaintiff to "ship to care of D. & C. McIver, shipping merchants, Liverpool, as soon as possible, for their next steamer to Boston direct." This shipment was made as ordered; and, on December 16, 1884, the defendant sent a further order, saying: "As regards the shipping of the leather just received, you have done everything satisfactory. Ship this order in like manner."

The direction by which the plaintiff was to be controlled must be interpreted as requiring him to forward the goods to D. & C. McIver to be transported by them by the Cunard line, of which they were managers and agents. The words "their next steamer" could not have meant any steamer which would accept freight from D. & C. McIver. Cases may be readily imagined where these words would be of the highest importance, as if the defendant had an open policy of insurance protecting his goods which might be sent by the Cunard line. It might also be true that the defendant would not deem a policy of insurance necessary when goods were sent by a well-established passenger line, where greater precautions might probably be taken for safety, which he would deem necessary when they were sent by a purely freighting steamer. The goods were actually forwarded to D. & C. McIver, with instructions in conformity with the directions of the defendant; and, had the matter ended there, so far as any directions to D. & C. McIver is concerned, the plaintiff would be entitled to treat them as delivered to the defendant, and to require him to pay the purchase money. If, on the other hand, while the goods were yet in the hands of the carrier, and before transportation of them had commenced, the plaintiff changed the directions given to him by the defendant, or authorized the carrier to transport them in a different mode from that directed by the defendant, and loss has thereby occurred, he cannot contend that they were delivered to the defendant by him. By continuing to exercise dominion over them, and by giving new direction impliedly withdrawing the directions previously given, he cannot be allowed to assert that he had made a complete delivery by his original act, if a loss has occurred by reason of that which he has subsequently done or directed. The change in the directions given relates back to and qualifies the original delivery.

The plaintiff, in answer to a letter from D. & C. McIver, after the goods had reached them, inquiring whether they were to keep the goods "for our steamer 14th inst., or ship by the Glamorgan," ordered them to be shipped by the steamer arriving out first, presumably the steamer which D. & C. McIver believed would be the first to arrive. The Glamorgan was not a steamer of any line of which D. & C. McIver were owners or agents, and in no way answers the description of "their steamer" as applied to D. & C. McIver. By neglecting to limit the authority of D. & C. McIver to send by a steamer which could be thus described, and by directing them to send by the steamer which would first arrive, the plaintiff had failed to comply with the orders of the defendant as to the shipment of goods, and, if correct directions had originally been given, had withdrawn them and substituted others. When, therefore, exercising the authority thus given by the plaintiff, D. & C. McIver send by the Glamorgan, as being in their judgment the steamer likely to arrive first, and a loss occurs, it should not be borne by the defendant, whose directions have not been followed.

Judgment for the defendant.

QUESTIONS

1. Suppose that the goods had safely reached the defendant, could he rightfully have refused to accept them because they were not shipped as he directed them to be shipped?
2. B requests S to manufacture and ship by the X Company 1,000 pairs of shoes of a certain kind. S ships the goods by the Y Company. They are lost in transit. S sues B for the price of them. What decision?
3. The shoes arrive safely but B refuses to accept them because his shipping instructions were disobeyed. What decision in an action by S for the price of the goods?
4. S ships 950 pairs of shoes of the kind requested by the X Company. They are lost in transit. S sues B for the price of 950 pairs. What decision?
5. S ships 1,050 pairs by the X Company. When they arrive, what may B do?
6. S ships 1,000 pairs by the X Company. They are lost in transit. S sues B for the price of them. B offers evidence tending to show that the shoes were not of the kind and quality ordered. Should the evidence be admitted?
7. S agreed to sell and deliver coal to B at X. The coal was selected by S from his stock, loaded in a barge furnished by him, and shipped. The barge, reaching X safely in the late afternoon, was moored alongside

B's wharf for unloading the following day. During the night the barge sank and the coal was lost. S sues B for the price of the coal. What decision?

8. S has put half of the coal into B's yard when the barge sinks. B directs him to reload that portion as he wanted the whole shipment or none. S refuses to do so and sues B for the price of the coal unloaded. What decision?

MITCHELL *v.* LE CLAIR

165 Massachusetts Reports 308 (1896)

Contract, upon an account annexed, to recover the price of sixty tubs of butter sold by the plaintiffs to the defendant. Trial in the Superior Court, without a jury, before RICHARDSON, J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs are wholesale butter dealers in Boston, and the defendant is a grocer in Southbridge. On September 6, 1893, the defendant visited the store of the plaintiffs inquiring the price of butter. The plaintiffs offered to sell to the defendant sixty tubs of butter, of the same kind and quality as that previously bought by the defendant from the plaintiffs, for twenty-seven cents per pound, cash, provided he accepted before twelve o'clock on the following day. The defendant before twelve o'clock on the following day, by telegram, accepted the offer. The plaintiffs testified that, immediately upon the acceptance of the offer, they went to the public storage warehouse, where they had large quantities of butter stored, and picked out sixty tubs of butter, weighed it, set it to one side, and marked each tub for the purpose of designating it as the butter of the defendant, and at once sent a bill of all of it to the defendant, marked "Cash on demand." The defendant had no notice whatever of this selection, setting aside, and marking of sixty tubs of butter, except the receipt of the bill. There was no evidence introduced to show that the kind or quality of the butter thus set aside was or was not of a similar grade or quality as that sold the defendant before. No objection was ever made by the defendant to paying for any of it on the ground that it was not of the quality or kind of butter purchased. Afterward, the defendant at different times directed shipments to be made by the plaintiffs, of the butter so bought by him, and the same was shipped, to the amount of forty tubs, and accepted without any objection, and paid for. The plaintiffs testified that these forty tubs were taken from the lot set aside as stated above; but of this fact the defendant had no

knowledge, except from the bill sent at the time of purchase, which enumerated the separate weight and tare of each tub of butter.

In March, 1894, the defendant directed the plaintiffs to ship to him the remaining twenty tubs of butter. This the plaintiffs refused to do until they had first received the pay for them, claiming that the sale was for cash on demand, and demands for payment having been previously made. The defendant did not understand these to be the terms; but did understand that he was to receive delivery of the butter, and pay for it during the three months succeeding September 26, 1893. The price of butter declined in the market soon after the agreement was made. The plaintiffs still have the butter on storage, subject to the order of the defendant when he pays for it.

The defendant asked the judge to rule "that the selection, setting aside, and marking the sixty tubs, as testified to by the plaintiffs, could not be considered a delivery, the defendant neither having knowledge of such action nor assenting thereto, expressly or by implication; and "that the plaintiffs had failed to make out their case, in that there was no evidence that the butter selected, set aside, and marked, as aforesaid, was of the kind and quality ordered."

The judge refused to rule as requested; found that, by the agreement, the defendant was to take all the sixty tubs, and pay for it within three months from September 26, 1893; and that the plaintiffs made several demands upon the defendant, before and after the expiration of the three months, to take the rest of the butter and pay for it, and found for the plaintiffs. The defendant alleged exceptions.

Knowlton, J. The principal question in this case is whether there was a sufficient delivery of the butter to pass the title as between the parties. There is no dispute that there was a good contract of sale, and no question arises under the statute of frauds.

The defendant accepted by telegram the plaintiffs' offer to sell him sixty tubs of butter of a specified quality at twenty-seven cents per pound. The plaintiffs had in their storehouse a large quantity of butter. Upon receipt of the defendant's telegram accepting their offer, they were impliedly authorized, as the defendant's agents, to set apart and appropriate to him the goods called for by the contract. This they immediately did, weighing the butter, setting it apart, and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked, "Cash on demand." This completed the sale and passed the title. *Arnold* v. *Delano*, 4 Cush. 38.

If the contract is not in such form as to be binding under the statute of frauds such an appropriation does not constitute an acceptance under that statute, nor does it change the possession, and thereby deprive the vendor of his lien for the price. But if the vendee in such a case afterward refuses to take the goods and pay for them, the vendor may recover the price if he keeps them in readiness for delivery to the purchaser. Under a contract of sale, when the goods have been so appropriated and set apart, the vendor has done that which by the terms of the agreement makes the whole consideration payable; and so long as he remains ready to do whatever else is to be done to give the vendee the benefit of his purchase, he is entitled to receive the agreed price without deduction on account of his retention of his lien upon the property. *Morse* v. *Sherman*, 106 Mass. 430; *Putnam* v. *Glidden*, 159 Mass. 47; *While* v. *Soloman*, 164 Mass. 516.

There was sufficient evidence to warrant the judge in finding that the butter answered the requirements of the contract. The plaintiffs appropriated it to the defendant as butter of the quality called for. Their conduct then and afterward was equivalent to a declaration that it conformed to the agreement of the parties. Afterward shipments were made from time to time of a part of it, amounting to forty tubs in all, which were accepted and paid for by the defendant without objection. This was an admission by the defendant that the quality of the forty tubs was such as he expected. The bill sent to the defendant in the first place gave the separate weight and tare of each tub of butter. The defendant directed the shipping to him of the remaining twenty tubs, and the only dispute between the parties at that time was in regard to the terms of payment, the plaintiffs asserting that the property was to be paid for on demand, before parting with the possession, and the defendant contending that he was entitled to receive it and to have three months, from the time of sale, in which to make payment. While these facts do not make it certain that the twenty tubs remaining in the possession of the plaintiffs were of good quality, they warrant an inference in favor of the plaintiffs' contention, in the absence of anything to show the contrary. The last instruction requested was therefore rightly refused.

Exceptions overruled.

QUESTIONS

1. At the time the contract was made in this case was the subject-matter of the transaction ascertained? What difference does it make whether

it was ascertained or not? Under the doctrine of this case when did title pass?

2. The plaintiff, after having set aside and marked sixty tubs of butter for the defendant, sold and delivered ten tubs to X. The defendant brings action against X for conversion. What decision?
3. The store of the plaintiff burns and all its contents are destroyed. The plaintiff sues D for the price of sixty tubs of butter. What decision?
4. What would have been the decision in this case, if the defendant could have shown that the sixty tubs of butter were not up to specifications?
5. What would have been the decision if the plaintiff had set aside seventy tubs of butter of the kind called for by the defendant? or had set aside only fifty tubs?
6. How would this case have been decided under the Sales Act?

CITY OF CARTHAGE *v.* DUVALL

202 Illinois Reports 234 (1903)

This was an action commenced by the city of Carthage against Duvall, before a police magistrate, to recover a penalty for selling intoxicating liquor in said city contrary to an ordinance thereof. The defendant was discharged by the police magistrate and the city perfected an appeal to the circuit court of Hancock County, where on a trial before the court, a jury having been waived upon a stipulation as to the facts, a judgment was rendered in favor of the defendant, which judgment has been affirmed by the appellate court for the third district, and a further appeal has been prosecuted to this court.

HAND, J. It is agreed between the parties that there is but one question presented for decision in this case, viz., do the facts show a sale of intoxicating liquor in less quantities than five gallons by the defendant to Skidmore within the city of Carthage. The determination of that question depends upon whether the title to the liquor vested in Skidmore at Burlington or at Carthage. If at Burlington, the defendant is not liable, and if at Carthage, he is.

The general rule frequently announced by this court is, that the delivery of personal property by the seller to a common carrier to be conveyed to the purchaser is a delivery to the purchaser, and that the title to the property vests in the purchaser immediately upon its delivery to the carrier. (*Pike* v. *Baker*, 53 Ill. 163; *Ward* v. *Taylor*, 56 *id.* 494; *Ellis* v. *Roche*, 73 *id.* 280.) Whether such rule applies where the property is consigned C.O.D. is an open question in this court, but upon principle and authority, where, as here, everything

which the seller has to do with the property has been done at the time it is delivered to the carrier, we see no reason why the title does not vest in the purchaser immediately upon its delivery, although it is consigned C.O.D., or why the same rule should not be applied to intoxicating liquor that is applied to other classes of personal property. In several states (*State* v. *O'Neil*, 58 Vt. 140; *State* v. *United States Express Co.*, 7 Iowa, 271; *State* v. *Wingfield*, 115 Mo. 428;) the courts hold that the title to intoxicating liquor when it is consigned C.O.D., does not vest in the purchaser until it is received, accepted, and paid for. The great weight of authority, however, is the other way. (*State* v. *Moffitt*, 73 Me. 278; *Commonwealth* v. *Fleming*, 130 Pa. St. 138; *Pilgreen* v. *State*, 71 Ala. 368; *State* v. *Cart*, 43 Ark. 353; *Crook* v. *Cowen*, 64 N.C. 743; *State* v. *Flanagan*, 38 W.Va. 53.) In the *American and English Encyclopedia of Law*, after stating the general rule that where personal property is delivered by the seller to a common carrier upon the order of the purchaser the title immediately vests in the purchaser, it is said (XVII, 2d ed., 300):

> A somewhat different question is presented when the sales are made C.O.D. There is much diversity of opinion as to whether sales of this character are to be deemed absolute sales on the part of the vendor with a provision for withholding delivery until actual payment, so as to preserve the lien for the price, or only as executory contracts of sale, not completed until actual delivery into the hands of the buyer. In a number of decisions it has been held that for the purpose of determining whether the seller has violated the liquor laws in force where the buyer lives, a sale C.O.D. is not complete until delivery, acceptance, and payment of the price by the person ordering the liquors. At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C.O.D., the sale is completed when the liquor is delivered to the carrier.

The cases that hold the title to the property vests in the purchaser upon a C.O.D. consignment, place such holding upon the ground that the carrier is the agent of the purchaser to deliver the property and the agent of the seller to collect and return the purchase price, and that the only interest of the seller in the property after its delivery to the carrier is a lien for the purchase price.

From an examination of the authorities cited in the briefs, and such other authorities as we have been able to find bearing upon the subject, we have reached the conclusion that the sale to Skidmore

was completed when the liquor was delivered to the express company in Burlington, and that no sale of liquor was made by the defendant to Skidmore in the city of Carthage.

The judgment of the Appellate Court will therefore be affirmed.

QUESTIONS

1. Is it a rule of law that title to goods shipped C.O.D. passes when the goods are delivered to the carrier? Or is it a question of fact, depending upon the circumstances of each case?
2. If the seller intended to pass title when the goods were delivered to the carrier, why did he ship them C.O.D.?
3. S, in Detroit, ships goods to B, in Chicago, billed "f.o.b." Detroit. What is meant by "f.o.b."? When does title pass?
4. S, in Detroit, ships goods to B, "f.o.b." Chicago. When does title to the goods pass?
5. How would the principal case have been decided under the Sales Act?

WAIT *v.* BAKER

2 Exchequer Reports 1 (1848)

This was an action of trover for 500 quarters of barley. Pleas, not guilty, and not possessed; upon which issue was joined.

The defendant, a corn-factor at Bristol, had occasional dealings with a person of the name of Lethbridge, who was a corn-factor at Plymouth. The defendant and Lethbridge entered into a contract by which Lethbridge agreed to sell and the defendant to buy "250 quarters of chevalier barley at 42*s.* per quarter and 250 quarters common at 40*s.* per quarter f.o.b., for cash payments, on receipt of bill of lading and invoice, or acceptance at two months' date adding interest at the rate of 5 per cent per annum."

Lethbridge chartered a vessel by the name of Emerald and caused it to be loaded with common and chevalier barley. On January 7, 1847, Lethbridge received from the master of the vessel the bill of lading of the cargo, which was therein expressed to be deliverable at Bristol to the order of Lethbridge or assigns, paying the freight as per charter. On the eighth, Lethbridge called upon the defendant at Bristol early in the morning, and left at his counting-house the invoice and the unindorsed bill of lading. Later in the day, Lethbridge called again upon the defendant, when the defendant raised some objection to the quality of the cargo and asserted that it was inferior to the samples: he also threatened that he would take the

cargo and sue Lethbridge for eight shillings a quarter difference. After some further dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money and said that he accepted the cargo. Lethbridge, however, refused to accept the money and to indorse the bill of lading to the defendant, but took the bill of lading from the counter and immediately proceeded to the plaintiffs', who were corn-factors, and had a house of business in the neighborhood, and indorsed the bill of lading to them, and received an advance upon it. The market at that time had risen considerably.

The Emerald arrived on the sixteenth, and on the eighteenth the defendant proceeded on board and claimed the cargo as the owner, and unshipped 1,240 bushels of the barley, worth £422, 14*s*.; but the plaintiffs coming on board during the time the cargo was being unshipped, presented the bill of lading and obtained the rest of the cargo, and paid the captain the freight.

The jury found that the defendant did not refuse to accept the barley from Lethbridge, that the tender was unconditional, and that Lethbridge was not an agent intrusted with the bill of lading by the defendant. His Lordship thereupon directed a verdict to be entered for the plaintiffs for £422, 14*s*., reserving leave to the defendant to enter verdict for him. A rule to show cause having been obtained, Parke, B., delivered the opinion of the court.

Parke, B. I am of opinion that the rule in the present case ought to be discharged. It is perfectly clear the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answer the character of that which was agreed to be delivered. By the original contract, therefore, no property passed; and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action—the action being for the recovery of the property—that, at some subsequent time, the property passed. It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there

is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract.

In this case it is said that the delivery of the goods on shipboard is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee.

The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract that, by the bill of lading, Lethbridge should retain control over the property. It seems to me to follow that the delivery of the 500 quarters to the captain, to be delivered to Lethbridge, is not the same as a delivery of 500 quarters to a common carrier by order of the consignee. The act of delivery, therefore, in the present case, did not pass the property. Then, what subsequent act do we find which had that effect? It is admitted by the learned counsel for the defendant, that the property does not pass, unless there is a subsequent appropriation of the goods. The word appropriation may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; and the contract will show when the word is used in that sense. Or the word may mean that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case. For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coachmaker's, he may make any one he pleases, and, if it agree with the order, the party is bound to accept it. Now suppose that, at some period subsequent to the order, a further bargain is entered into between this party and the coach-builder, by which it is agreed that a particular carriage shall be delivered. It would depend upon

circumstances whether property passes, or whether merely the original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage, which, in the Roman law, was called *obligato certi corporis*, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery; although the property, after the contract, remained at the risk of the vendee, and if lost without any fault in the vendor, the vendee and not the vendor was the sufferer. The law of England is different: here, property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it. "Appropriation" may also be used in another sense, and is the one in which Mr. Butt uses it on the present occasion, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it.

It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. It is an appropriation in the first sense of the word only; the vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterward amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretense for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when the unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. If that is so, the case remains, as to the question of property, exactly as it did after the original contract. There is a contract to deliver a cargo on board, and probably for an assignment of the cargo by indorsing the bill of lading to the defendant, but there was nothing which amounted to an appropriation, in the sense of that term which alone would pass the property.

The result is, that in this action of trover, the plaintiffs, claiming under Lethbridge by the indorsement of the bill of lading, are entitled to the property; and then Mr. Baker has his remedy against him (Lethbridge) for the non-fulfilment of his contract, which he certainly has not fulfilled.

Rule discharged.

QUESTIONS

1. Do you infer from the court's decision that the buyer had no recourse against the seller in this case?
2. What is a bill of lading? What functions does it perform? In what sense is it a document of title? a credit device?
3. S ships goods to B, taking a bill of lading to his own order and retaining it. He sends an invoice to B stating that the goods have been shipped on B's account and at his risk. The goods are lost in transit. S sues B for the price of the goods. What decision?
4. S indorses the bill in blank and sends it forward to B. Before the document reaches B, the goods are attached by C, a creditor of S. B sues C for possession of the goods. What decision?
5. S ships goods to B, taking a bill of lading to the order of B. The goods are lost in transit. S sues B for the price of the goods. What decision?
6. In the foregoing case, S retains the bill of lading. The goods are lost in transit. Upon whom does the loss fall?
7. What provisions are found in the Sales Act governing the use of bills of lading?

FORBES *v.* BOSTON & LOWELL RAILROAD COMPANY
133 Massachusetts Reports 154 (1882)

Morton, C. J. The first case is an action of tort containing a count for the conversion of a quantity of corn and a count for the conversion of a quantity of wheat. As different considerations apply to the two counts, they must be treated separately.

On or about October 20, 1879, Gallup, Clark and Company, grain-dealers in Chicago, in response to an order from Foster and Company, forwarded to Boston fifty carloads of corn by the National Despatch Freight Line, which is an association of several railroad companies whose roads make a continuous line from Chicago to Boston, the defendant's road being a part of the line. Upon the shipping of the corn, an inland bill of lading was issued, by which it was consigned to the order of Gallup, Clark and Company, at Boston. Gallup, Clark and Company drew a draft upon Foster and

Company for the price of the corn, attached to it the bill of lading, and forwarded both to the Tremont National Bank of Boston. On October 24, 1879, Foster and Company paid to the bank the amount of the draft, and the draft and bill of lading were delivered to them. Immediately upon obtaining the draft and bill of lading, Foster and Company indorsed them to the plaintiffs as security for an advance then made by the plaintiffs to the full amount of the draft, and they have held them ever since. The corn mentioned in the bill of lading was received and transported by the defendant, arriving in Boston on October 30, 1879. It remained in its cars until December 12, 1879, when by the orders of Foster and Company it was shipped on board a vessel for Cork and exported to Ireland. Foster and Company did not produce and present to the defendant the bill of lading, but represented that it was in their possession.

Upon these facts it is too clear to admit of any doubt that, by the transfer of the draft and bill of lading by Foster and Company to the plaintiffs, the title and property in the corn passed to them. The bill of lading, though not strictly a negotiable instrument like a bill of exchange, was the representative of the property itself; it was the means by which the property was put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself.

The transaction between Foster and Company and the plaintiffs was not in form or in effect a mortgage, so that, as contended by the defendant, it must be recorded in order to have validity; it was a transfer and delivery of the property. The clear intent of the parties was that the property in the corn should pass to the plaintiffs as security for the advance made by them. Whether they took an absolute title with a liability to account for the proceeds, or a title as pledgees, is not material, as all the authorities show that they took either a general or a special property in the corn, which entitles them to recover of anyone who wrongfully converts it. *DeWolf* v. *Gardner*, 12 Cush. 19; *Cairo National Bank* v. *Crocker*, 111 Mass. 219; *Dows* v. *National Exchange Bank*, 91 U.S. 618. Numerous other cases might be cited. The delivery of the bill of lading was in law the delivery of the property itself, and it was not necessary that the plaintiff should take immediate possession of it upon its arrival, or that they should give notice to the carrier or warehouseman who held the property. *Farmers and Mechanics' National Bank* v. *Logan*, 74 N.Y. 568; *Myerstein* v. *Barber*, L.R. 2 C. P. 38, 661.

The next question is whether there was a conversion by the defendant. It is settled that any misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion, which renders the bailee liable in an action of tort in the nature of trover, without regard to the question of his due care or negligence. *Hall* v. *Boston and Worcester Railroad*, 14 Allen 439. By the bill of lading, and by the waybill which was sent to the defendant in the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark and Company. The defendant contracted to deliver it to such person as Gallup, Clark and Company should order, and could not without violating its contract deliver it to any other person. By delivering it to Foster and Company, therefore, the defendant became liable for a conversion unless it shows some valid excuse. *Newcomb* v. *Boston and Lowell Railroad*, 115 Mass. 230. The record before us does not show any *laches* or any act of the plaintiffs which can excuse or justify this misdelivery. The defendant saw fit to deliver the goods to Foster and Company without requiring them to produce the bill of lading, relying upon their representation that they were holders of it. It took the risk of their truthfulness, and cannot now shift that risk upon the plaintiffs who have done nothing to mislead or deceive the defendant. We are, for these reasons, of opinion that the defendant is liable for the value of the corn described in the first count of the declaration.

In the case of the wheat, there are some facts proved at the trial which lead us to a different result. By the bills of lading and the waybills, the wheat was consigned to John H. Foster and Company at Boston. The fact that they did not contain the words "or order," or other equivalent words, so as to make them upon the face *quasi* negotiable, is not important. The bill of lading was yet the representative of the wheat, and its transfer and delivery to the plaintiffs vested in them the title to the property, as against the consignees and their creditors. But the presiding justice of the Superior Court who heard the case has found as a fact, "that it was the custom of the railroads terminating in Boston to deliver to the consignee goods 'billed straight' as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the waybills to determine the consignee and the form of the consignment."

Under this finding, we must assume that the custom existed and that the plaintiffs knew or ought to have known of it. It materially affects the relations and rights of the parties. Although it does not affect the question of the title of the plaintiffs as against Foster and Company, it qualifies the duties of the defendant as to the delivery of the wheat. It justified the defendant in delivering it to Foster and Company, the consignees, at least at any time before notice that the property had been transferred. Under it, there was no *laches* in not calling for the bill of lading; and, in thus delivering, there was no violation of any of the terms of its contract, express or implied. Such delivery therefore was not a misdelivery which would amount to a conversion and render the defendant liable to the plaintiffs. We are therefore of opinion that the defendant is not liable for the value of the wheat sued for.

QUESTIONS

1. What was the legal effect of the bill of lading covering the consignment of wheat as between Gallup, Clark and Company and Foster and Company? Did the bill of lading covering the consignment of wheat have the same legal effect?
2. What was the legal effect of the indorsement of the bills of lading by Foster and Company to the plaintiffs?
3. Why was the defendant held liable in trover for a conversion of the corn and not held for a conversion of the wheat?
4. S ships goods on B's account. He takes out a bill of lading to B, sends it forward to A and directs A to deliver the bill to B on payment of the purchase price of the goods. The goods are lost in transit. S sues B for the price of the goods. What decision?
5. In the foregoing case, so far as S is concerned does it make any difference whether the bill is made to B straight or made to the order of B?
6. In No. 4, S takes out a bill of lading to the order of A, sends it forward to A and directs him to indorse and deliver it to B on payment of the purchase price of the goods. The goods are lost in transit. S sues B for the price of the goods. What decision?
7. In the foregoing case, so far as S is concerned, does it make any difference whether the bill is made to A straight or made to the order of A?

COMMERCIAL BANK *v.* ARMSBY COMPANY

120 Georgia Reports 74 (1904)

CANDLER, J. The J. K. Armsby Company, an Illinois corporation, shipped to Walton & Carr, their brokers, in Augusta, a quantity of salmon for distribution to different parties to whom the goods had

been sold. Walton & Carr were merely agents of the Armsby Company, and had no right or title to the salmon. The goods were shipped from a point in Oregon, by parties from whom they had been ordered by the Armsby Company, on a through bill of lading to Augusta and were consigned to the order of the consignor, with directions to notify Walton & Carr. The Armsby Company sent Walton & Carr a check for the amount of the freight, which was paid, and it also mailed them the original bill of lading, which was indorsed in blank. Carr, a member of the firm of Walton & Carr, took the bill of lading to the Commercial Bank of Augusta, and hypothecated it for a loan of money. Shortly thereafter Walton & Carr failed, and the bank converted the salmon for the payment of its debt, whereupon the Armsby Company brought against it the present suit, which was an action of trover. The case was tried before the judge of the city court of Richmond County, without a jury. The bank showed that it was the general custom of the trade in Augusta that bills of lading "to order notify" were attached to drafts for the purchase price of the goods represented by them; that possession of the bill of lading could only be obtained by payment of the draft; that possession of such a bill of lading was considered prima facie evidence of ownership of the property for which it was issued; and that it was treated by banks as negotiable paper. It was also shown that the J. K. Armsby Company had done business in Augusta for a number of years; and that while Walton & Carr were merchandise brokers they also bought and sold goods on their own account. It was admitted that neither the bank nor any of its officials knew or had reason to suspect that Carr had no right to convey the salmon, and that in the event the bank should be held liable, the proper amount to be recovered was $700. The judge found in favor of the plaintiff, and rendered judgment in its favor for the amount mentioned. The defendant excepted.

"Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external *indicia* of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title." Civil Code, section 3539. The sole question for our determination then, is, does a bill of lading of the character of the one involved in this suit constitute such an external *indicium* of the right of disposing of the property for which it was issued as to bring the case within the operation of the rule laid down in the code section cited? As a

general rule, the transferee of a bill of lading can obtain no better title to the goods which it covers than that which was in the person by whom it was transferred. Indeed, it is a self-evident proposition that no man can convey that which he does not possess. But the true owner of property may, by placing it in the power of another to defraud innocent purchasers by an apparently valid transfer of the property, cut himself off from claiming it, and thereby divest the title from himself. In 4 Am. & Eng. Enc. I (2d ed.) 551, it is said that an important exception to the general rule which has already been stated "arises in the case of the transfer of a bill of lading to a bona fide purchaser for value by a consignee to whom the goods are, by the terms of the instrument, made deliverable, or to whom the consignor and original owner of the goods has endorsed and delivered the bill. It seems to be established that in this case the transfer defeats the vendor's right of stoppage *in transitu*, and passes the title to the goods to the bona fide transferee." See also 6 Cyc. 424; 1 Mechem on *Sales*, section 166; *Pollard* v. *Reordan*, 65 Fed. 848. While a bill of lading is not in the full sense a negotiable instrument, it is treated by universal commercial usage as a symbol of the goods for which it is issued; and consequently it is in a measure negotiable. In Georgia, it may be pledged as security for debt (Civil Code, sec. 2956) and a bona fide assignee for the value is protected in his title against the owner's right of stoppage *in transitu* (Civil Code, sec. 3553). In *American Nat. Bank* v. *Georgia Railroad Co.*, 96 Ga. 665, the status of bills of lading under our law is discussed with considerable fullness; and while the decision in that case is not directly in point on the question involved in the case at bar, the reasoning of Mr. Chief Justice Simmons has an important bearing thereon. The following language from the opinion of Mr. Justice Miller in the case of *McNeal* v. *Hill*, is there quoted with approval:

> As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges of barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention of like character for the transfer, without the cumbersome and often impossible operations of actual delivery of articles of personal property, is the endorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis*. From long use and trade they have come to have among commercial men a well-understood meaning, and the endorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale.

In this case there was no dispute as to the general custom of trade in regard to bills of lading of the character of the one negotiated by Carr with the Commercial Bank. It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill of lading was regarded as prima facie evidence of the title of the holder of the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for the purchase price of the goods, and can only be obtained by payment of the draft. Carr's possession of the bill of lading was, therefore, prima facie evidence that he had paid a draft drawn by the consignor and was entitled to the property. The departure of the Armsby Company from this custom placed it in the power of Carr to commit a fraud on the bank—an opportunity of which he seems to have promptly availed himself. Applying the well-known rule that where one of two innocent persons must suffer from the wrong of another the burden should be borne by him who placed it in the power of the wrong-doer to perpetrate the fraud, we fail to see how it can be held that the plaintiff can recover. The Georgia cases cited by counsel for the defendant in error do not, in our opinion, conflict with what is here laid down. The case of *Tison* v. *Howard*, 57 Ga. 410, which is more nearly in point than any of the other cases cited, is easily distinguishable from the case at bar. There the owner of the goods received from the transportation company duplicate bills of lading, both of which he indorsed in blank, sending the original to his factor and depositing the duplicate in a bank for safe-keeping and for no other purpose. The bailee bank indorsed the duplicate bill of lading and secured from the factor an amount of money in excess of the value of the goods. The court held, in effect, that a bill of lading is not, in the full sense, a negotiable instrument; and that the deposit of the bill with the bank being purely a bailment for safe-keeping, the virtual theft of it by the banker did not deprive the true owner of the goods of his title. In the case now under consideration no such state of fact is made to appear. The Armsby Company forwarded to Walton & Carr a bill of lading the possession of which, under the universal custom of business, gave a prima facie right to the disposal of the goods for which it was issued. The purpose for which the instrument was confided to Walton & Carr does not definitely appear from the record; but there is nothing to indicate that it was merely intrusted to them for safe-keeping. There was nothing to put the bank on notice that title to the property was in anyone other than the holder of the bill

of lading. A fraud was committed by Carr, by means of which he obtained from the bank a large sum of money. To say nothing of the provisions of the Civil Code, section 3539, the plainest principles of of equity require that the Armsby Company, which made the commission of the fraud possible, and not the bank, should bear the loss.

Judgment reversed.

QUESTIONS

1. Do you understand that the court in this case is holding that a bill of lading is as fully negotiable as a bill of exchange or a promissory note?
2. S ships goods to A to be sold by A as agent for S. A delivers the goods to C, his creditor, in satisfaction of a personal claim of C against him. C acts in good faith in taking the goods. S sues C for possession of the goods. What decision?
3. S ships goods to B, sending forward a bill of lading to B or order. B for value indorses the bill to C before the goods arrive. When they arrive, the carrier refuses to deliver them to C upon presentation of the bill of lading. What are C's rights against the carrier?
4. In the foregoing case, B indorses the bill of lading in blank and loses it. T finds and sells it to C, a bona fide purchaser. C presents the bill of lading and secures possession of the goods. B sues C for possession of the goods. What decision?
5. How could the plaintiff have protected himself in the principal case?
6. How would this case have been decided in a state in which the Sales Act has been adopted?

INGALLS *v.* HERRICK

108 Massachusetts Reports 351 (1871)

Tort against the sheriff of Essex for the conversion of twenty-one bales of flocks of wool, attached by a deputy of the defendant as property of William H. Lougee, in a suit against Lougee by one of his creditors.

At the trial in the Superior Court the plaintiff introduced evidence which tended to show that on December 16, 1868, he bargained with Louis Bosworth, Lougee's duly authorized agent, for the purchase of the flocks at an agreed price; that he bought them to sell again; that the bales were numbered and marked, weighed 7,818 pounds, were of about the ordinary size of bales of cotton, and were stored in Lougee's factory; that he told Bosworth that he had no place of his own to store them in, and should wish to have them remain for a while where they were, and would pay storage on them, and Bosworth

agreed to this; that he also told Bosworth that he was going to New York the next day, and must have samples of flocks to take with him, to resell them by; that on the evening of the same day, at Lougee's counting-room in Lawrence, he received a bill of parcels of the flocks dated that day and signed by Lougee, specifying the numbers, marks, and weights of the bales, and acknowledging receipt of the agreed price, \$360.64 for six bales, weighing 2,254 pounds, at 16 cents per pound, and \$612.04 for fifteen bales, weighing 5,664 pounds, at 11 cents per pound; that at the same time Bosworth gave him parcels of the two kinds of flocks; and that he saw the flocks in the storeroom at the factory a week or two before December 16, but did not see them on that day, nor afterward, until they had been attached by the defendant's deputy.

Bosworth testified, among other things,

that after the bargain was made he went to the factory and examined the bales to get the number and weight of each bale, and wrote the bill of parcels afterward signed by Lougee, and delivered it to the plaintiff; that he opened two of the bales and took out small quantities of the flocks, which the plaintiff wanted for samples to sell by, and then sewed up the bales; that he met the plaintiff during the afternoon, and told him that the bill and the samples would be ready for him that evening, at Lougee's counting-room; and that he gave these flocks to the plaintiff at the time of the delivery of the bill of sale.

This was all the evidence of a delivery; and the judge ruled that it would not authorize the jury to find a delivery of the goods as against the attaching creditor of the seller, and directed a verdict for the defendants. The plaintiff alleged exceptions.

Colt, J. It was ruled as matter of law, in this case, that the jury would not be authorized upon this evidence to find a delivery of the baled flocks, sufficient to pass a title valid as against creditors of the seller.

There was evidence tending to show that the bargain for the sale was made with one Bosworth, an agent of the seller. A receipted bill of parcels, signed by the seller himself, which contained a description of the bales by number, mark, and weight, was afterward delivered by the agent to the plaintiff. The subject-matter of the sale was all of the baled flocks then stored in the seller's factory. It was thus a completed contract of sale, and as between the parties the title passed to the plaintiff. Was there evidence to go to the jury of a delivery sufficient as to creditors? This is the only question, and

in disposing of it we must take the sale to have been made in good faith and for a valuable consideration.

Upon this question, there was evidence tending to show that the flocks were bought for resale; that the bales were large, not easily moved, and requiring room for storage; that the plaintiff, having no convenient place, agreed with Bosworth, at the time of the bargain, to let them remain where they were and pay storage, and directed him to obtain samples of the flocks, which he, the plaintiff, could take with him to New York to sell by; and that Bosworth accordingly opened the bales, took out samples of two kinds of flocks, sewed up the bales, and gave the samples to the plaintiff at the time he delivered the bill of particulars. The plaintiff bought upon his own previous knowledge of the article, having seen the flocks at the storeroom of the factory a week or two before. The samples were not required or used by him in reference to his own purchase, and Bosworth, in taking them from the bales, acted under the directions and as the agent of the plaintiff, and with reference to future sales by him. It was a significant act of ownership and possession on the part of the plaintiff, after the sale was agreed on, through Bosworth, acting in this respect as his agent. There is something more, therefore, here disclosed, than a mere contract of sale without delivery or possession under it. And we are of opinion, under the law heretofore laid down by the court, that the case should have been submitted, with proper instructions, to the jury.

It was early held that the possession of personal chattels by the vendor after an alleged sale is not conclusive evidence of fraud. Upon proof that the sale was made in good faith and for a valuable consideration, and that the possession after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, the vendee might hold against creditors. *Brooks* v. *Powers*, 15 Mass. 244. It was declared by MORTON, J., in *Shurtleff* v. *Will*, 19 Pick. 202, 211, that, whatever the rule upon this point may be in England or elsewhere, it is perfectly well settled in a series of cases here, that the possession of the vendor is only evidence of fraud which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury. It is certain that slight evidence of delivery is sufficient; and if the buyer with the consent of the seller obtains possession before any attachment or second sale, the transfer is complete without formal delivery. *Shumway* v. *Rutter*, 8 Pick. 443. A delivery of a

portion in token of the whole is a sufficient constructive delivery as against creditors, although the goods are in the possession of various persons. *Legg.* v. *Willard*, 17 Pick. 140. In *Hardy* v. *Potter*, 10 Gray, 89, the jury were told that, although the plaintiff only took a bill of sale, yet, if prior to the attachment he had been to the place where the lumber was and had exercised acts of ownership over it, by virtue of his purchase, that would constitute a delivery of it, good against a subsequent attachment. And this instruction was not held open to exception, although the evidence was that the purchaser had only been to Beverly and seen the lumber there. See also *Phleps* v. *Cutler*, 4 Gray, 137; *Tuxworth* v. *Moore*, 9 Pick. 347; *Bullard v. Wait*, 16 Gray, 55; *Ropes* v. *Lane*, 9 Allen, 502, and 11 Allen, 591.

The fact that the possession of the property is retained by the vendor by agreement, and does not follow the bill of sale, is held by this court to be, in most of the cases, evidence of fraud, to go to the jury. In many of the states the fraud is held to be an inference of law resulting inevitably from the possession. And such was supposed to be the earlier English rule, as laid down in *Edwards* v. *Harben*, 2 T. R. 587; but the only point there decided was, that an absolute conveyance without possession, if there be nothing but that, is in point of law fraudulent. In the more recent cases, it has been declared that the continued possession by the vendor, of goods sold, is a fact to be considered by the jury, as evidence of fraud, and is not in law a fraud itself. *Martindale* v. *Booth*, 3 B. & Ad. 498. Benjamin on *Sales*, 363.

There was evidence here of delivery, which should have been submitted to the jury.

Exceptions sustained.

QUESTIONS

1. What error did the lower court commit in the trial of this case? How should it have instructed the jury?
2. Did the higher court reverse the decision on the ground that there was evidence of a delivery of possession or on the ground that delivery of possession was not necessary under the circumstances of this case?
3. S sells and delivers goods to B with "intent to delay, hinder, and defraud his creditors." (*a*) B, though paying value for the goods, has notice of S's intent. (*b*) B pays value and has no knowledge of S's intent. What are the rights of S's creditors under each hypothesis?
4. In the last case, B accepts the goods in satisfaction of a past indebtedness but has no knowledge of S's fraudulent intent. What are the rights of S's creditors against B?

5. B accepts the goods in payment of the debt with knowledge of S's intent. What are the rights of S's creditors?
6. S, with intent to defraud his creditors, delivers his goods to B as a gift. B accepts the gift in good faith without knowledge of S's intent. What are the rights of S's creditors?
7. S sells goods to B and retains possession of them. C attaches the goods as property of S. B sues C for possession of the goods. How should the jury be instructed on this state of facts?
8. S sells bulky goods to B. B has no place in which to store them and asks S to hold them for a few days. The goods, still in S's possession, are attached by S's creditors. B sues the creditors for possession of the goods. What instruction should the court give to the jury on this state of facts?

LANFEAR *v.* SUMNER

17 Massachusetts Reports 110 (1821)

Trover for the conversion of one hundred chests of young hyson and fifty chests of hyson tea, averred to be the property of the plaintiff. Trial on the general issue, before the Chief Justice, November Term, 1819.

The plaintiff, to prove his property, produced in evidence the following paper: "For value received, I hereby assign and set over to Ambrose Lanfear and to his assigns, one hundred chests of young hyson tea, and fifty chests of hyson tea, shipped at Canton, by Benjamin C. Wilcocks, on board of the ship 'Osprey,' Captain Brown, bound to Boston, being my property and consigned to me. Philadelphia, July 2, 1819. William Waln."

The plaintiff was the agent of the house of Thomas Wilson & Company, merchants in England, to whom the said Waln was indebted in a much larger sum than the value of the teas. By the testimony of the said Waln, and other testimony in the case, it appeared that the paper recited above was executed and delivered to the plaintiff before two o'clock P.M. of the said second day of July. No money was paid by the plaintiff, nor any discharge executed of the debt due to said Wilson & Company, or any part thereof.

The action was defended under the said Sumner, who, as a deputy sheriff of Suffolk, had attached the same teas at the suit of James & Thomas H. Perkins & Company merchants in Boston and creditors to Waln to a large amount, upon bills of exchange drawn upon him and by him accepted. The attachment by the defendant was made on

the same second of July, at half an hour past five o'clock in the afternoon; and possession of the teas was taken by him.

It appeared that the paper aforesaid, purporting to be an assignment of the teas in question to the plaintiff, was by him transmitted to John Dorr, merchant in Boston, as soon as the course of the mail would admit, and was received by Dorr on the fifth of July, who, within an hour after the receipt of the same, made demand of the teas by virtue of an authority given by the plaintiff on the back of the paper; but he did not obtain possession.

It appeared that the teas arrived at Boston, in the ship "Osprey," a day or two before the said second of July, consigned by the said Wilcocks to the said J. & T. H. Perkins & Company, on the account and risk, and for the use of the said Waln; and the said Perkins & Company had entered them in the custom-house and had given bonds for the duties thereon. An offer was made by Dorr, in behalf of the plaintiff, to idemnify them against their said bonds, and to pay all further charges thereon.

A verdict was taken for the plaintiff by consent, to be set aside if the action could not be maintained on the foregoing facts, and a nonsuit entered; otherwise judgment was to be rendered on the verdict, with additional interest.

JACKSON, J. Considering this case in the most favorable view for the plaintiff, it is the case of two creditors, each endeavoring to secure his debt out of the same fund. Neither party had notice of the measures adopted by the other; but each was using his diligence fairly, for the purpose of obtaining payment of a just debt. The question is, Which acquired the best legal title?

In this statement of the case, we consider Messrs. Wilson & Company, for whom the plaintiff was agent, as the real plaintiffs, and the Messrs. Perkins & Company, who caused the attachment to be made, as the real defendants.

The conveyance, relied on by the plaintiff, was intended as a payment, to the amount of what the goods should produce; or as security of a debt due from Waln to Wilson & Company.

But it is objected that this consideration of the conveyance does not appear in the instrument; that there was no discharge of the debt, no receipt for the goods with an obligation to account for the proceeds, and no writing whatever showing the agreement which is said to have been made between the parties; but that the instrument purports to be an absolute conveyance by Waln, for a full price

received, which must have operated as a fraud upon all the other creditors of Waln.

These objections are certainly entitled to much consideration, but there is another defect in the plaintiff's title, which we think fatal, and that is the want of delivery to him, in pursuance of the supposed conveyance.

A few hours after this conveyance was made in Philadelphia, the defendant attached the goods in Boston. The attaching creditors are to be considered as purchasers for a valuable consideration, and in the present case, as purchasers bona fide, and without notice of the prior conveyance to the plaintiff. The defendant took possession under their title; and the plaintiff never acquired possession.

The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against everyone but the vendor. When the same goods are sold to two different persons, by conveyances, equally valid, he who first lawfully acquires the possession will hold them against the other. This principle is recognized in the case of *Lamb et al* v. *Durant*, 12 Mass. Rep. 54, and in *Caldwell et al* v. *Ball*, 1 D. and E. 205. The latter indeed was a case, not of actual delivery of goods to either party, but of delivery of the bill of lading. There were two bills of lading, signed at different times by the master of the ship; and the party who first obtained one of them by a legal title from the owner of the goods was held to have the best right, although the bill of lading, under which he claimed, was made the last. The indorsement and delivery of the bill of lading, in such a case, is equivalent to the actual delivery of the goods.

Upon these principles, it is obvious that the defendant must prevail in this case, unless there was a legal delivery to the plaintiff, or something equivalent to an actual delivery, before the attachment made by the defendant. We can see nothing of that kind in the evidence reported. The plaintiff and Waln, it is true, supposed at the time of their negotiations that the goods were at sea. But if they had been so, Waln had no bill of lading, and no other document or evidence of his title to deliver to the plaintiff. The case, therefore, does not come within the rule applicable to the indorsement and delivery of a bill of lading; nor can we perceive that it comes within any other exception to the general rule, which requires an actual delivery to the vendee.

Suppose that these goods had been consigned to Waln himself, and that the bill of lading had come to his hands after this negotiation

with the plaintiff. If, in that case, a third person had purchased the goods of Waln for a valuable consideration and without notice of any prior conveyance, and had taken the bill of lading indorsed by Waln, it would not, we think, be doubted that he would hold the goods against the plaintiff. If so, it shows that the property was not absolutely and entirely transferred from Waln to the plaintiff. It might be so, as between themselves; but not with regard to a subsequent bona fide purchaser, for a valuable consideration; and this is the relation in which the defendant now stands.

Plaintiff nonsuit.

QUESTIONS

1. Distinguish this case from *Ingalls* v. *Herrick, supra* page 108.
2. Does the court in this case hold that delivery is necessary to the passing of title? If not, what does the court hold?
3. S ships goods to the town of P and takes out two bills of lading to his own order. One he indorses in blank and forwards to B with a draft attached. B accepts the draft. Later, he indorses the other in blank and sends to X with a draft attached. X accepts the draft and secures possession of the goods. B sues X for possession of the goods. What decision?
4. S sells goods to B, retaining possession of them. S later sells and delivers the same goods to X, a bona fide purchaser. B sues X for possession of the goods. What decision?
5. In the foregoing case, X knew of the sale to B when his transaction with S took place. What are B's rights against X?
6. Assuming the rule in the principal case to be law, what kind of delivery is necessary to protect the first purchaser as against a second purchaser?

c) *Collateral Undertakings of the Seller*

CHAPMAN *v.* MURCH

19 Johnson's New York Reports 290 (1822)

Spencer, C. J. In the various cases which have been cited, it appears abundantly that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it nowhere appears that it is necessary that the vendor should use the express words that he warranted the soundness. If a man should say, on the sale of the horse, "I promise you the horse is sound," it is difficult to conceive that this is not a warranty, and an express one too. Peake (on *Evid.* 228) says: "In an action on a warranty, the plaintiff must prove the sale and warranty." "In general," he says, "any representation made by the defendant of the state of the

thing sold, at the time of the sale, will amount to the warranty." He adds, "But where the defendant refers to any document, or to his belief only, in such cases no action is maintainable, without proof, that he knew he was representing a falsehood." In every action on a warranty it must be shown that there was an express and direct affirmation of the quality and condition of the thing sold, as contra-distinguished from opinion, etc., and when that is made out, it would be an anomaly to require that the word warrant should be used. Any words of equivalent import, showing the intention of the parties, that there should be a warranty, will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the court.

QUESTIONS

1. What is the essence of a warranty? Must it be in any certain set form of words?
2. S sells corporate stock to B with the statement: "This stock will certainly be above par before the end of the year." B sues S for damages for breach of an alleged warranty. What decision?
3. S and B are negotiating for the sale and purchase of a horse. S says: "The horse is only five years old." B, relying on the statement, buys the horse. B sues S for breach of warranty and proves that the horse is ten years old. What decision?
4. S says to B: "The horse is sound to the best of my knowledge." S knew that the horse was unsound. B sues S for breach of warranty. What decision?
5. S sells a horse to B with the statement: "The horse is sound in all respects." B asks: "Do you warrant him so?" S replies: "No, I never warrant anything; but I say the horse is sound." B sues S for breach of warranty. What decision?
6. S contracts to sell cotton to B "to arrive on the 'Philadelphia.'" Assuming that the cotton does not arrive on the "Philadelphia," what are the rights of B?
7. S contracts to make a suit of clothes to B's personal satisfaction. Assuming that the suit, when completed, does not satisfy B, what are B's rights under the agreement?

LITTLE *v.* WOODWORTH

8 Nebraska Reports 281 (1879)

Cobb, J. Action for breach of warranty in sale of a horse by plaintiffs in error to defendant in error. On the trial in the district court the judge at the request of defendant in error, gave the following instructions in charge to jury:

If during the negotiation for the sale of the horse the defendant made an assertion of soundness, which assertion was intended to cause the sale of the horse, and was operative or effectual in causing such sale, then such assertion would constitute a warranty. But a mere expression of an opinion is not enough to constitute a warranty.

But in case you should be of opinion that the plaintiff has not made out a warranty by a preponderance of the evidence, then, in the second place, you are to inquire whether the plaintiff can recover by reason of fraudulent representations; even if there was no warranty the defendants will be liable to the plaintiff if they represented the horse to be sound, and the plaintiff, ignorant of his unsoundness, and relying on such representations, was induced by them to make the purchase provided that such representations were false and the defendants knew them to be so.

But it should be borne in mind that in order to give a purchaser a right of action for fraudulent representations the representations must have been an inducement to the purchase. If the purchaser knows of the defects afterward claimed to have been the subject of the false representations, or if he resorts to other means of knowledge open to him and chooses to judge for himself in the matter, and relies upon such other means of knowledge and not upon the representations made, the defendants cannot be made liable.

The court also refused to give the following instructions prayed for by the plaintiffs in error: "Warranty does not extend to such defects as are patent and visible to the purchaser, and if the jury believe from the testimony that the plaintiff had knowledge of the defects in the eyes of his horse or could have discovered them by inspection he cannot recover in this case, although you shall believe from testimony that there was an express warranty as to soundness on the part of the defendants."

It is well settled that no particular form or set of words are necessary to constitute a warranty of the character or soundness of

chattels, but that any form of words, whereby a vendor, pending a negotiation, makes affirmation or assertion that his article of traffic is possessed of a particular character for the purpose of inducing a purchase, when such affirmation or assertion is relied upon by the purchaser, will constitute a warranty. Some cases make a distinction between affirmation and mere assertion, but in the sense in which the words are used in this connection there is no difference. Again, many cases make a distinction between the assertion of a fact and the expression of an opinion. Whether certain words would be regarded as the affirmation of a fact or the expression of an opinion would often depend upon the nature of the article commended. Words which might amount to a warranty of soundness of a horse might be regarded as a mere expression of opinion when applied to the merits of a patent washing machine.

We see no objection to the first instruction given, as it very fairly expresses the law of the case as we understand it. As to the second instruction, while it was scarcely applicable to the evidence in the case, yet as it expresses only correct law and could not have misled the jury, the giving of it is not sufficient cause for disturbing the judgment; and so of the other instructions given.

There is no error in the court's refusal to give the instruction prayed for by plaintiffs in error. The defendant in error was no judge of horses or of diseases of horses. He had heard that there was something wrong with one of the horse's eyes. He made inquiry of the other party and was told that "the horse must have got a straw in it." He received the same reply from the former owner of the horse as well as from others. They all agreed in ascribing that whatever was the matter with the horse's eye came from the trivial cause of his having got a straw in it. The defendant in error was engaged as a clerk, his duties requiring his regular attendance, and hence allowing him no opportunity to make inquiries as to the horse's condition; he was dealing with a responsible firm, whose guaranty or whose word was perfectly good. Under these circumstances he had the right to rely upon their warranty that the horse was "all right."

We have treated this case as though there was no conflict in the testimony, the verdict of the jury who are the sole judges between conflicting testimony having settled that.

Judgment affirmed.

QUESTIONS

1. S warrants that a horse is sound in all respects. B buys the horse, with knowledge that it is lame. B sues S for breach of warranty. What decision?
2. S sells flour to B, warranting that a certain grade of bread can be made from it. B knows that the statement is false, because he has previously used the flour. What decision in an action by B against S for breach of warranty?
3. S says to B: "This is the best machine on the market for the money." B believes the statement, and buys the machine, and finds out before he gets home that the statement is false. B sues S for breach of warranty. What decision?
4. S sells B a watch with a written guaranty that it will keep accurate time for five years. B sues S for breach of warranty. S contends that he is not liable because a warranty must relate to the past or present and not to the future. What decision?
5. S sells some oats to B. Two hours later, B asks S if he will warrant that, the oats are of a certain grade. S says that he will. B sues S for a breach of this warranty. What decision?

SHATTUCK *v.* GREEN

104 Massachusetts Reports 42 (1870)

Two actions of contract. The first action, by Shattuck against Green, was on a promissory note dated December 5, 1866, for $300 payable on demand with interest, given by Green to Shattuck in part payment for an undivided half of the furniture, fixtures, and stock in trade of an eating-house in East Boston, called a dining saloon. The answer set up a failure of the consideration for the note in that Shattuck did not own this property and therefore could not sell it.

The second action, by Green against Shattuck, was for breach of Shattuck's alleged warranty of title to the property sold, and to recover part payment on the property.

The judge ruled that upon the evidence, if submitted to the jury, they would not be authorized to find an implied warranty from Shattuck to Green, and that Green could not maintain his action or defense on the ground of warranty of title and failure thereof, or of a failure of consideration of said note; and directed a verdict for the plaintiff in the first case and for the defendant in the second case, which verdicts the jury returned, and Green alleged exceptions.

Morton, J. It is a general rule of law in this country, that in a sale of chattels a warranty of title is implied, unless the circumstances

are such as to give rise to a contrary presumption. 1 Smith, *Leading Cases* (6th Amer. ed.), 242; 1 Parsons on *Contracts* (5th ed.), 576; and cases cited. If the vendor has either actual or constructive possession and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title, and a warranty is implied. In *Whitney* v. *Heywood*, 6 Cush. 82, 86, DEWEY, J. says: "Possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interests of persons having no possession, actual or constructive, and in such cases, no warranty of title is implied." The possession of an agent, of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells goods thus held as his, a warranty of title is implied. *Hubbard* v. *Bliss*, 12 Allen, 590; *Cushing* v. *Breed*, 14 Allen, 376.

In the case at bar, it appeared that Shattuck on December 7, 1866, bought of Wilks W. Corey an undivided half of the stock in trade, furniture, and fixtures of a dining saloon in Boston, and on December 11, 1866, sold the same to Green. Shattuck was in New Hampshire, and did not take manual possession of the property, but it remained, as it had previously been, in the possession and use of Corey & Stiles, who were carrying on the saloon, said Corey being a son of Wilks W. Corey. Green, after the sale to him, entered into possession in connection with the younger Corey, and remained in possession until the property was taken by the National Warehouse Company under a paramount title. Thus Corey & Stiles were in actual possession of the chattels at the time of the sale to Green. There was no evidence that they held them adversely to Shattuck, or to Wilks W. Corey and Shattuck, who by the sale of December 7 became tenants in common. On the contrary, there was evidence which might well satisfy the jury that they held possession of them as the bailees or agents of Wilks W. Corey and Shattuck. If this was so, and Shattuck sold to Green one undivided half of the property as his, there was an implied warranty of title. The ruling at the trial that the jury would not be authorized to find an implied warranty was therefore erroneous. The argument that the written contract between the parties contains no express warranty, and excludes an implied one, cannot prevail. The parties did not put their contract in writing. The indorsement of the bill of sale does not purport to set out the contract of sale. That appears to have been by parol; and the fact that the vendor

delivered the bill of sale, with such assignment on it, either as a muniment of title, or as a symbolical delivery, or as an incident of the transaction, does not prevent his liability upon the implied warranty of title.

In considering these exceptions, we are obliged to assume as true all the facts which the testimony in favor of the excepting parties tends to establish. At the new trial, it will of course be for the jury to decide whether there was in fact a sale by Shattuck to Green, or whether Shattuck acted merely as the agent of Green in the purchase of Corey, so that no warranty of title would be implied against him.

Exceptions sustained.

QUESTIONS

1. In getting at the question whether a warranty of title is implied in the sale of personal property, what difference does it make whether the seller is in possession or not?
2. When the court speaks of an implied warranty of title, does it mean a warranty implied in fact or implied in law?
3. S, a pawnbroker, sells property to B. The property in question was stolen from P and pledged to S. B, having returned the property to P, sues S for damages arising from an alleged breach of warranty of title. What decision?
4. Is it reasonable to suppose that there would be an implied warranty of title arising out of a sale by a public officer?
5. S contracts to sell an automobile to B. When S tenders the machine in performance of his promise, B knows that it belongs to P. Must B accept the property? If not, what may he do, assuming that he has already paid the purchase price?
6. Assume in the last case that B accepts the machine. What decision in an action by B against S for breach of warranty of title?

WOLCOTT, JOHNSON & CO. *v.* MOUNT

36 New Jersey Law Reports 262 (1873)

Action on a contract of warranty. On trial, it appeared that Wolcott, Johnson & Co. were merchants keeping a store of general merchandise, and that, among other articles, they advertised and kept for sale agricultural seeds. Mount had been accustomed, year after year, to sow early strap-leaf red-top turnip seed to produce turnips for the early New York market, because of the large profit this kind of turnip yielded. Mount went to the store of Wolcott, Johnson & Co. and asked for early strap-leaf red-top turnip seed.

One of the partners showed and sold him turnip seed which he stated was the kind Mount had asked for.

Mount sowed the seed on ground which he had prepared with care and great expense for the purpose. The turnips produced therefrom were not early strap-leaf red-top turnips, but turnips of a different kind and not salable in the market and fit only for cattle. As a result Mount lost his profits for that season.

It was agreed that Wolcott did not know that the seed he sold Mount was not early strap-leaf red-top turnip seed, and that he did not sell the seed to him fraudulently. It was also agreed that this kind of turnip seed cannot be known and distinguished, by an examination through sight or touch, from Russia or other kinds, but only by the kind of turnips it produces after sowing, can it be known.

The Court of Common Pleas gave judgment for the plaintiff below for $99.12 damages.

Depue, J. The action in this case was brought on a contract of warranty and resulted in a judgment against the defendants in the action for damages.

Two exceptions to the proceedings are presented by the brief submitted. The first touches the right of the plaintiff to recover at all. The second the measure of damages.

In the absence of fraud or a warranty of the quality of an article, the maxim, *caveat emptor*, applies. As a general rule, no warranty of the goodness of an article will be implied on a contract of sale. But in a number of instances, it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefor has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages.

The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to

afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.

The contract which arises from the description of an article on a sale by a dealer, not being the manufacturer, is not in all respects co-extensive with that which is sometimes implied, where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case a warranty under some circumstances is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase is made. Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that, where the contract is oral, loose expressions of judgment or opinion pending the negotiations might be regarded as embodied in the contract, contrary to the intentions of parties, is without reasonable foundation. It is always a question of construction or of fact whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract, when concluded. If the contract is in writing, the question is one of construction for the court. *Bhen* v. *Burness*, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. *Lomi* v. *Tucker*, 4 C. & P. 15; *De Sewhanberg* v. *Buchanan*, 5 C. & P. 343; *Power* v. *Barham*, 4 A. & E. 473. In the case last cited, the vendor sold by a bill of parcels, "four pictures, views in Venice—Canaletto." It was held that it was for

the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on *certiorari*, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred.

Judgment affirmed.

QUESTIONS

1. If there was a warranty in the transaction under consideration in this case, precisely what was it?
2. Suppose that Wolcott had furnished Mount with the seed asked for, but that the seed were of such inferior quality that Mount's crop failed, what would have been the decision in an action by Mount for breach of warranty?
3. S contracts to sell a horse to B and delivers a cow in performance of his engagement. Must B accept the cow and sue for damages? May he accept the cow and sue for damages? In the latter event, what will be the measure of his damages?
4. Could the plaintiff have sued for and recovered the purchase price of the turnip seed, when he discovered that he had not got what he bargained for? Upon what theory could he have done so?
5. Does the Sales Act contain any provisions relating to sales by description?

BARNARD *v.* KELLOGG

10 Wallace's United States Reports 383 (1870)

Davis, J. No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of

express warranty, where the buyer has an opportunity to inspect the commodity and the seller is guilty of no fraud and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the states in the Union where the common law prevails, with one exception (South Carolina), sanction it.

QUESTIONS

1. What is the doctrine of *caveat emptor?* When do you suppose it originated and why?
2. What justification is there, if any, for the doctrine of *caveat emptor?*
3. S sells bran to B which B had the opportunity to inspect. The bran is molded and half rotten. B sues S for damages. What decision?
4. S sells a lame horse to B. The lameness of the animal would have been discovered if B had demanded that the horse be brought from its stall. What are B's rights against S?
5. The court said in this case: "In the rule of *caveat emptor* there is no hardship for if the purchaser distrusts his judgment he can require of the seller a warranty that the quality of the goods he desires to buy corresponds with the sample exhibited." Is this a sufficient justification of the doctrine?
6. Do you think it would be good business policy to insist on one's rights under the rule of *caveat emptor* even though sanctioned by law?

LUKENS *v.* FREIUND

27 Kansas Reports 664 (1882)

The plaintiff bought of the defendant bran with which to feed his cattle. The bran had two copper clasps in it. These clasps were swallowed by one of the plaintiff's cows, and lodging, one in the paunch and the other in her stomach, poisoned and killed her. Action for damages. The trial below resulted in a verdict and judgment for the plaintiff in the sum of $31.66. The defendants appeal.

Brewer, J. Plaintiff claims a right to recover on the ground of an implied warranty; that the defendants were manufacturers; that they sold the bran, the product of their own manufacture, to him, knowing that it was to be used in feeding stock, and thereby impliedly warranted that it was fit for such use; and that the same rule applies whether the food be purchased for personal use or for the feeding of stock.

The unquestioned rule of the common law was, *caveat emptor*. As it is said by the author in 1 Smith's *Leading Cases*, page 242:

"The policy of the common law seems to have been to limit the effect of a sale to the transfer of the right of property from the vendor to the purchaser, and to throw the hazards of the purchase upon the latter, unless he had expressly stipulated that they should be borne by the former. No warranty of quality or value was consequently implied from the sale, either of personal or real estate."

Upon this recognized policy of the common law, there have been repeated efforts to engraft exceptions, and now it may be conceded that a few have been successfully established. Among them may be mentioned these: Where an article is ordered from a manufacturer, to be by him manufactured for a special purpose, of which the manufacturer has knowledge, there is an implied warranty that the article when manufactured shall be reasonably fit for such purpose. *Craver* v. *Hornburg*, 26 Kan. 94.

Again, where goods are sold by sample, there is an implied warranty that the goods when delivered shall correspond in quality with the sample. *Field* v. *Dinnear*, 4 Kan. 476; *Bigger* v. *Bovard*, 29 Kan. 204. And a third is, where food is sold by a dealer for domestic consumption, there is an implied warranty that it is sound and wholesome. Other exceptions may also exist, but it is unnecessary to mention them.

Passing now to the third; and the scope of that exception is limited by the decisions. There is not in every sale of provisions an implied

warranty that they are wholesome. Such implied warranty does not exist where one dealer purchases from another. *Moses* v. *Mead*, 1 Denio, 378; *Wright* v. *Hart*, 18 Wend. 428; *Ryder* v. *Neitze*, 21 Minn. 70; *Emerson* v. *Brigham*, 10 Mass. 197; see also the same case reported in 6 Am. Dec. 117, and the note thereto. It exists only where they are sold for immediate and domestic use, and even then is denied by some authorities. In such cases it seems to be decided upon principles of public policy that there is an implied warranty that the provisions sold are sound and wholesome. *Van Bracklin* v. *Fonda*, 12 Johns. (N.Y.) 457; *Hoover* v. *Peters*, 18 Mich. 51; Benjamin on *Sales*, sections 670–71; and the note in 6 Am. Dec., *supra*.

Now the application of this exception to the case at bar is denied. It is said that the principle upon which the exception rests does not apply where the articles sold are not intended for consumption by man, but only for use as food for cattle. No authorities have been found by counsel on either side of this question. We are left, therefore, to determine it upon general principles. Upon what ground is an implied warranty rested in the case of a sale of provisions, which does not exist in the case of a sale of other articles? Obviously it is not upon any property grounds, or because thereby the estate of either party is affected; but for reasons of public policy, for the preservation of life and health, the law deems it wise that he who engages in the business of selling provisions for domestic use should himself examine and know their fitness for such use, and be liable for a lack of such knowledge. One may not place poison where it is likely to be taken by one ignorant of its qualities. Regard for human life compels this. No more may he sell food unfit to be eaten to a man who, he knows, is buying it to eat. The same reason controls, to wit, regard for life and health. But this, it will be remembered, is an exception to the general rule of the common law, and the exception should not be extended beyond the reach of the reasons upon which it is based.

If the preservation of human life and health be, as we think it is, the foundation of this exception, then it should not be extended to cases in which human life and health are in no wise endangered. Now the claim of the plaintiff is simply of a property loss, that his estate has been diminished, and that alone is his cause of action. His injury is similar to that which he would have sustained if he had purchased from a wagon-maker a defective wheel, and thereby his

wagon had broken down. No matter of life or health of himself or family is involved. We think therefore that no recovery can be had under the principles of this third exception.

Judgment reversed and case remanded for new trial.

QUESTIONS

1. What exception to the rule of *caveat emptor* is discussed by the principal case? What are the reasons for the exception?
2. B goes into S's store, examines his stock of hams, picks out one, and pays for it. The ham is spoiled and a member of his family is made sick by eating a portion of it. B sues S for damages. What decision?
3. B, a retail grocer, buys canned vegetables from S, not a manufacturer. The vegetables are spoiled and are not fit for use as food. B sues S for damages. What decision?
4. S, a farmer, and not a regular dealer in meat, kills a hog, dresses it, and sells a part of it to B, knowing that B intends to eat it. The meat is not fit for food. B sues S for damages suffered. What decision?
5. Under the Sales Act is there any implied warranty that foodstuff is fit for human consumption?

GARDINER *v.* GRAY

4 Campbell's Reports 144 (1815)

The first count of the declaration stated, that the defendant undertook that 12 bags of waste silk, purchased of him by the plaintiff, should be equal to a sample produced at the time of the sale. Other counts stated the defendant's promise to be that the silk should be *waste silk* of a good and merchantable quality.

The silk in question was imported from the continent, and before it was landed, samples of it, which the defendant had received in a letter, were shown to the plaintiff's agent. The bargain was then made, and the sale note was written, which merely mentioned that 12 bags of *waste silk* were sold at 10*s.* 6*d.* per pound without referring to the samples, or specifying particularly the quality of the commodity. The silk was purchased in London and sent down to the defendant at Manchester. On its arrival there, it was examined, and found to be much inferior to the samples, and of a quality not salable under the denomination of "waste silk."

LORD ELLENBOROUGH: I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation; I cannot allow

it to be superadded by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of the opinion, however, that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied warranty in every such contract. Where there is no opportunity to inspect the commodity the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is whether the commodity purchased by the plaintiff be of such quality as can be reasonably brought into the market to be sold as *waste silk?* The witnesses describe it as unfit for the purposes of waste silk and of such a quality that it cannot be sold under that denomination.

Verdict for the plaintiff.

QUESTIONS

1. Would the decision in this case have been the same if the buyer had had an opportunity to inspect the goods before buying?
2. Suppose that he had had the opportunity to inspect but that the defects were such that they would not have been discoverable by an inspection, would the decision have been the same?
3. Does it make any difference in the application of the rule of the principal case whether the seller is a manufacturer, dealer, or casual seller of the subject-matter involved?
4. S, a manufacturer of pianos, contracts to sell a piano to B. B has no opportunity to inspect. The instrument is so inferior in every respect that it cannot be sold in the market as a piano. B sues S for damages. What decision?
5. Would the decision be the same in the foregoing case, if S were only a dealer in pianos? Would the decision be the same, if S were only a casual seller of the instrument?
6. In question 4, B had an opportunity to inspect but did not avail himself of it. (*a*) What decision at common law? (*b*) What decision under the Sales Act? (*c*) What decision at common law in case the defects would not have been discoverable by an ordinary inspection?
7. What provisons are found in the Sales Act concerning implied warranties of merchantability?

QUEEN CITY GLASS COMPANY *v.* CLAY POT COMPANY

97 Maryland Reports 429 (1903)

McSherry, C. J. This suit was brought by the Pittsburg Clay Pot Company, a body corporate, against the Queen City Glass Company, also a corporation, to recover the price of seventeen clay pots sold by the former to the latter. The declaration contains the usual money accounts. A plea denying the right of the Pittsburg Company to sue in the courts of this state, because of its failure to comply with the provisions of ch. 270 of the Acts of Assembly of 1898 was put in, which later on appears to have been demurred to; whereupon amended pleas of never promised, never indebted, and payment were filed. The case then went to trial before a jury and resulted in a verdict for the plaintiff, the Pittsburg Company, upon which verdict a judgment was entered and from that judgment this appeal was taken. There is but one bill of exceptions in the case, and that brings up for review the rulings on the prayers for instructions to the jury.

The Clay Pot Company is engaged in the manufacture of clay pots for use in glass factories. The Queen City Glass Company carries on the business of making glass bottles. In the prosecution of that business, clay pots about five feet high, four feet side, with walls four inches thick, are used to melt and hold the materials of which glass is composed. The clay pots, when shipped from the establishment where they are made, are unburnt. When needed for use by the glass factory they are placed in what is called a pot arch and subjected to an intense heat reaching two thousand degrees, and are kept there for several days. This process is called annealing. When annealed, the pots are quickly transferred from the pot arch to the glass furnace where they are filled with the materials out of which glass is made, and those materials are brought by the heat to a molten state, so that the glass blowers may fashion and shape the glass into bottles. In the process of annealing, some eight or nine of the seventeen pots, for the price of which this suit was brought, cracked, broke, warped, bulged, or melted down and flattened out in the pot arch and thus were rendered useless; whilst four or five of them, which had stood the annealing, cracked and broke in the glass furnace after two or three fillings, and the remainder lasted a much shorter time than such pots should be serviceable. It was shown in evidence that when the pots broke in the glass furnace, the molten

glass which they contained was spilled and wasted, causing a loss of two hundred dollars, and the molten material ran down into the eye of the furnace, cut the grate-bars and damaged the furnace to such an extent as to necessitate the expenditure of one hundred and fifty dollars for repairs. It was further shown that the employees of the Glass Company were skillful and competent and they had used care in annealing the pots. It was proved that the pots were made of clay brought from Germany, Missouri, Kentucky, Pennsylvania, and other places and that other ingredients were used in mixing the clay according to a secret formula known to the Pittsburg Company. In the nature of the case therefore it was impossible for the purchaser to discover any defects in the pots before they were placed in the annealing furnace, because no inspection could reveal any imperfections in their make-up or in the composition of the material of which they were constructed. The evidence further showed that inasmuch as nothing could be discovered by inspection, about the quality of the pots or as to their fitness for the use for which they were intended, the Glass Company was compelled to trust to and rely upon the manufacture and the manufacturer for their quality and fitness; and that the Pittsburg Company knew exactly to what use the Glass Company intended to apply them and what treatment in heating them would be necessary to put them in condition for use in the glass furnace.

At the conclusion of the evidence the plaintiff presented one prayer and the defendant three for instructions to the jury. The plaintiff's prayer was granted, but those of the defendant were rejected and in their stead the trial court gave two instructions of its own. Those are the rulings of which error is predicated.

The prayer granted at the instance of the plaintiff, the appellee in this court, proceeded upon the theory that if there was an express or implied warranty on the part of the vendor it was a warranty that the "pots were reasonably fit for the purpose of being heated in" the "retort or annealing furnace to be prepared for use in the melting of glass." The defendant's first prayer after setting forth hypothetically the facts substantially as we have narrated them, concluded with the legal proposition, deducible therefrom, that "said pots when sold to the defendant were sold upon an implied warranty on the part of the plaintiff that they were fit and serviceable for," first, annealing or heating in the retorts, and secondly, for heating and for retaining molten glass in the usual way of the manufacture

of glass articles in the defendant's works. The difference between the two prayers lies in this: By the plaintiff's the warranty extended no farther than the annealing of the pots and did not cover their use in the glass furnace; whilst by the defendant's first prayer the warranty included both of the uses for which the pots were intended and were furnished, viz., annealing and capacity or ability to hold the molten glass. Upon these two prayers two questions arise and they are: first, Was there a warranty? secondly, If there was, what is its scope and extent?

First: There is no pretense that there was an express warranty. Does an implied warranty arise by operation of law out of the circumstances of the case? We need not go farther than the Maryland Reports to find an answer to that question. In *Rice* v. *Forsyth*, 41 Md. 403, this court adopted and approved the proposition laid down in *Jones* v. *Just*, L.R. 3 Q.B. 197, as follows:

> Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty, that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own.

See *Osgood* v. *Lewis*, 2 H. & G. 524; 1 Parsons on *Contracts*, 468; *Johnson* v. *Cope*, 3 H. & J. 89; *Hyatt* v. *Boyle*, 5 G. & J. 110; *Gunther and Rodewald* v. *Atwell*, 19 Md. 157; *Wheat* v. *Cross*, 31 Md. 99.

We think it is quite clear that the proposition just quoted is applicable. The evidence already referred to, if credited by the jury, demonstrates that the purchaser was compelled to rely on the skill and judgment of the manufacturer. The clays were mixed according to a secret formula and they were made into form and shape by hand, the process involving the addition of successive layers of the material. It was impossible for the purchaser to know by an inspection or otherwise whether the various component elements had all been used, or if used whether they had been used in proper portions; or whether they had been skillfully manipulated; or whether the formula had been observed. Actual use of the pots was the sole method by which a defect could be discovered. They were manufactured for a special purpose which was known to the vendor, and the vendee was bound to trust to the manufacturer and to rely on his judgment. There could not well be a condition of circumstances more obviously within the doctrine of implied warranty.

Secondly: What is the scope and extent of the implied warranty? The instruction, given at the instance of the Pittsburg Company, limited the warranty to the annealing process; whilst the rejected first prayer of the Glass Company extended the warranty to the use of the clay pots in the glass furnace. If there was a warranty at all, upon what principle can it be said that it has been fulfilled or complied with if the thing warranted to be fit for a designated use, disintegrates or breaks down either before it has been put to that use or in the very act of being used for the purpose for which it was designed? The clay pots were purchased to be used in the manufacture of glass bottles. Their ultimate use was, therefore, in the glass furnace. The annealing process was merely preliminary to their final use. Without being annealed they were of no value to the purchaser. After being properly annealed they were in a condition to be used in the glass furnace provided they were free from inherent and hidden defects, and if when thus used they cracked and permitted the molten glass to escape, they obviously were unfit for the purpose to which they were to be applied and for which they had been manufactured and had been bought. It cannot be said that they were bought merely to be annealed, because both vendor and vendee knew perfectly well their real use was to hold in a fused state and at a high temperature the materials composing the glass. An implied warranty arising as this one did, to be a warranty at all, must be co-extensive with the use to which the thing warranted is intended to be put, which, as previously stated, was the melting of glass in the glass furnace, and not the mere annealing of the pots; and this both buyer and seller fully understood. Many cases have been referred to on the brief of the appellant to illustrate this view, but it is not deemed necessary to do more than name them, or rather some of them, without quoting from them. *Cochran* v. *Jones*, 65 Ga. 678; *Shaw* v. *Smith*, 45 Kans. 334; *Omaha Coal C. & L. Co.* v. *Fay*, 37 Neb. 68; and the copious notes to *McQuaid* v. *Rose et al.*, 22 L.R.A. 187.

According to the conclusion just stated there was error in granting the appellee's instruction and in rejecting the appellant's *first* prayer. The appellant's *second* prayer includes but part of the ground covered by the first. The granting of the *first* would render the *second* unnecessary.

The appellant's *third* prayer relates to recoupment. Upon the assumption that the warranty extended to the clay pots in the glass

furnace after they had been annealed in the retorts, the purchaser, the Glass Company, was entitled to recoup against the vendor's claim the amount of damages sustained by the vendee in consequence of a breach of warranty. *Crook, Horner & Co.* v. *B. & O.R.R. Co.*, 80 Md. 338; *Harman* v. *Bannon*, 71 Md. 424. The *third* prayer should therefore have been granted.

The instructions given by the court in lieu of the defendant's *first* and *second* prayers were at variance with the first of those two prayers, and for the reasons which have induced us to hold that the defendant's *first* prayer should have been granted, the instructions given by the court ought not to have been given. Because of the errors indicated, that is to say because of the granting of the plaintiff's prayer, the rejection of the defendant's *first* and *third* prayers and the granting of the court's two instructions, the judgment must be reversed and a new trial will be awarded.

Judgment reversed with costs above and below and new trial awarded.

QUESTIONS

1. What exception to the rule of *caveat emptor* does the court in this case lay down? How does the rule here differ from the rule concerning implied warranties of merchantability? What is the theory underlying the rule of the principal case?
2. Suppose that the Clay Pot Company had been merely a dealer in clay pots and not a manufacturer of them, would the decision in this case have been the same?
3. S sold an automobile wheel to B. S bought the wheel from X, who manufactured it. Due to defective wood in the spokes, the wheel collapsed while B was driving his machine, causing him extensive damage. (*a*) What are his rights, if any, against X? (*b*) What are his rights, if any, against S?
4. S, a grower, sells 500 bushels of corn to B. B uses 400 bushels for feeding. He plants 100 bushels. This is an action by B against S, for damages. B proves that the corn planted did not germinate and that he lost his crop. What decision?
5. Would your answer have been the same in the last question, in case B had informed S that he was buying the corn for planting?
6. Does it appear that the Clay Pot Company was in any way negligent in the manufacture of the clay pots? In the application of the rule of the principal case, does it matter whether the seller is negligent or not?
7. Summarize the rules of the Sales Act relating to implied warranties of "fitness for purpose."

HIGHT *v.* BACON

126 Massachusetts Reports 10 (1878)

Contract on an account annexed for leather sold and delivered. The answer contained a general denial, and alleged an agreement on the part of the plaintiffs that the leather was good and suitable to be made into boots and shoes, and averred that it was not suitable for that purpose, but was worthless.

At the trial in the Superior Court, before Bacon, J., without a jury, it appeared in evidence that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Milford; that the leather was sold at the store of the plaintiffs; that the defendants had full opportunity at the time of purchase to examine the whole lot purchased, and did examine two rolls out of the twenty sold; and that the rolls examined were equal in quality to that of the bulk.

It also appeared that the leather was bought by the defendants for the purpose of being manufactured into boots and shoes; and that the plaintiffs, when the sale was made, supposed that such was the purpose for which it was bought, but nothing was said at the sale about this purpose, although an inquiry was made as to whether the leather would crimp; and that the leather appeared to be good leather and suitable for the purpose stated above, and both parties believed it to be suitable for such purpose.

The defendants put in evidence tending to show that the leather was rotten and unfit to be made into boots and shoes, and contained a latent defect, but was of some value; and offered evidence tending to show that there was a general and universal usage in the leather trade, that, when leather is sold as good leather and it turns out to be rotten and nearly worthless, the buyer is not bound by the contract of sale, and may revoke it as in this case; but the defendants did not contend that there was any fraud on the part of the plaintiffs. The judge excluded this evidence on the ground that such usage would not be valid in this case.

Upon all the evidence in the case bearing upon the sale, the judge found that there was no express warranty; and, upon that part of the evidence which is stated above, ruled, as a matter of law, that there could be no implied warranty of the leather sold; and ordered judgment for the plaintiffs. The defendants alleged exceptions.

Colt, J. The judge before whom this case was tried found as a fact that there was no express warranty by the plaintiffs of the

quality of the leather sold to the defendants, and ruled, as matter of law, that, on the evidence stated in the bill of exceptions, there could be no implied warranty binding upon the plaintiffs.

There was nothing at the time of the sale said by either party of the purpose for which the leather was bought; and the evidence that the defendants were manufacturers of boots and shoes, and at the time of the sale asked the plaintiffs if the leather would crimp, is not sufficient to prove an implied warranty on the part of the plaintiffs that the leather was suitable for the purpose of being manufactured into boots and shoes, even if the plaintiffs supposed it was bought for that purpose.

It is said that when a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied warranty that the article is reasonably fit for the purpose to which it is to be applied. *French* v. *Vining*, 102 Mass. 132, 135; *Jones* v. *Just*, L.R. 3 Q.B. 197. But where the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies. *Barnard* v. *Kellogg*, 10 Wall. 383. *Cunningham* v. *Hall*, 4 Allen, 268. *Dounce* v. *Dow*, 64 N.Y. 411.

The case at bar is an action upon an executed sale by one dealer to another of a specific quantity of leather, which the seller did not manufacture, and as to the quality of which he had no superior information. The parties stood on an equal footing; the buyer had full opportunity to examine the goods in the store of the plaintiffs, and did, in fact, examine two rolls, which were fair samples of the lot. There was no fraud practiced. The leather appeared to be good and both parties believed it to be good and suitable for the purpose of being manufactured into boots and shoes. It is plain that the buyer inspected and selected the leather himself, without relying upon the skill and judgment of the seller. The particular use which was to be made of it was not made known by the buyer at the time of the sale, in such a way as to indicate a purpose to put upon the seller the responsibility of furnishing an article reasonably fit for the purpose to which it was to be applied. The defect complained of was a latent defect. *Howard* v. *Emerson*, 110 Mass. 320; *Deming* v. *Foster*, 42 N.H. 165.

Exceptions overruled.

QUESTIONS

1. Would the decision in this case have been the same if the seller had been a manufacturer of the leather which he sold?
2. B asked S for "rust-proof oats" which S furnished him under that name. B sued S for damages, alleging and proving that the oats were not rust-proof and that as a consequence he lost his crop. S offered evidence tending to show that "rust-proof oats" was a trade name for a particular kind of oats. Should the evidence be admitted?
3. B informs S that he wants a refrigerator that will maintain a certain even temperature and asks for a "Polar Bear Refrigerator" which B deals in. B sues S for damages, alleging and proving that the refrigerator does not maintain the temperature desired. What decision?
4. Would your answer be the same in the foregoing case, if it appeared that S was the manufacturer as well as the seller of the article in question?

NIXA CANNING COMPANY *v.* LEHMANN-HIGGINSON GROCER COMPANY

70 Kansas Reports 664 (1905)

Mason, J. The Lehmann-Higginson Grocer Company sued the Nixa Canning Company on a claim that a quantity of canned apples purchased by the former from the latter under an implied warranty of merchantability had proved worthless. Plaintiff recovered a judgment which defendant seeks by this proceeding to reverse. The trial court made detailed findings of fact, which generally tended to support the plaintiff's claim, and held the defendant liable for a breach of warranty.

The principal question presented on review is whether, under the findings, the law implied a warranty that the goods sold were suitable for food. So far as necessary to the determination of this question, the facts found are as follows: The apples were put in cans by the defendant for the purpose of selling them to merchants, and were bought by plaintiff, as defendant knew, to be resold to its customers. The sale was made by sample, the sample cans being opened and examined by the plaintiffs before the purchase. The samples were apparently sound and fit, and were not in fact subject to any defect that could have been discovered by any reasonable examination. The goods sold were in all respects like the sample, but by reason of the character of certain substances that had been employed in the canning process they spoiled and became unmerchantable within a

few months, and before they could have been disposed of in the usual course of trade.

Plaintiff in error contends that where goods are sold by sample there is, in effect, an express warranty of conformity to the sample, and no other warranty as to quality can be implied. This may be granted to be ordinary rule as to transactions between merchants, but where the seller is also the manufacturer, there is an implied warranty that the sample and goods sold are alike free from latent defects not discoverable upon ordinary examination. (15 A. & E. Encycl. of L., 2d ed., 1227; 2 Mech., *Sales*, sections 1329, 1331, 1346; *Price* v. *Kohn*, 99 Ill. App. 115.) This exception to the general rule is not denied; but it is argued that the defendant was not a manufacturer; that the business of putting up apples in cans for sale is not one of manufacturing anything. There is a lack of harmony in the judicial decisions as to just what constitutes "manufacturing." This is abundantly demonstrated by the note to *Williams* v. *Warren* 64 L.R.A. (N.H.) 33, in which the cases are collected and reviewed. But it is wholly unnecessary to consider whether the term "manufacturing" could be aptly applied to the business of defendant in any other connection than that here presented. The only pertinent inquiry is whether defendant was a manufacturer within the reason and meaning of the doctrine holding the sellers of goods of their own making to a higher degree of accountability than other merchants. The reasons for such distinction were clearly stated in *Kellogg Bridge Company* v. *Hamilton*, 110 U.S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86, in these words:

In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of the latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture.

These reasons apply with as much force to one who undertakes to prepare fruits or other natural products so as to render them suitable articles of merchandise as to one who is a manufacturer within the strictest meaning of the term. He alone knows the details of the process employed; he alone controls it; and he must be deemed to represent that it is reasonably adapted to the end sought, and results in a product free from hidden defects. The buyer has no means of information as to such matters, and of necessity must rely upon the seller's judgment.

In *Copas* v. *Anglo-American Provision Company*, 73 Mich. 541, 548, 41 N.W. 690, it was said: "The sale of hams or bacon, which is the curing of pork in a particular manner, involves the same principles of law which are applicable to manufactured articles, involving knowledge, skill and fitness on the part of the manufacturer, who is also the seller, where he manufactures and sells his own goods."

We but follow the line marked out by the authorities, and certainly do no injustice, in holding that, in selling to plaintiff by sample canned apples of its own packing, both the samples and the goods sold being apparently sound and wholesome, the defendant by implication warranted that the process it employed did not involve the use of any deleterious substance, the presence of which could not be detected by any reasonable examination but which would in a short time render the fruit unfit for food, unmerchantable, and worthless. The court having found that there was a breach of such warranty, the plaintiff was entitled to judgment.

The judgment is affirmed.

QUESTIONS

1. What was the basis of the plaintiff's claim in this case—implied warranty of merchantability, warranty that the subject-matter of the sale was fit for human consumption, or warranty that the subject-matter conformed to a sample?
2. Did not the plaintiff get, by description, what he bargained for? Was not the bulk of the subject-matter as good as the sample exhibited? If so, what is the basis of his recovery?
3. Would the same decision have been reached in this case, if the defendant had been a dealer merely and not a manufacturer?
4. S, a coffee merchant, exhibits various samples of coffee to B. B goes to the warehouse and examines the various grades corresponding to the samples. Returning to the showroom, B says that he will buy 50 bags

"corresponding to sample A." B sues S for damages, proving that the coffee delivered is inferior to the sample exhibited. What decision?

5. S sells coffee to B by sample. When the coffee arrives, B finds that it is not of the same quality as the sample and refuses to accept it. S sues B for the purchase price. What decision?
6. In the foregoing case, B receives the coffee, though inferior in quality, and sues S for damages. What decision?
7. What are the remedies of the buyer when a warranty has been broken by the seller?
8. What provisions are found in the Sales Act relating to sales by sample? Under the Sales Act what are the remedies of the buyer for breach of a warranty?

(d) *Performance of the Contract*

BELL *v.* HATFIELD

121 Kentucky Reports 560 (1905)

The appellee sued the appellant to recover damages upon a breach of contract for the sale of cattle. Appellee, as owner of 25 cattle known as "feeders," sold them to appellant at 4 cents a pound, to be delivered at East View, some miles distant from appellee's place, on or about September 1, "with a few days to play on." Appellant was to notify appellee of the day he would receive them, and appellee was to "dry lot" the cattle the night before. This term is agreed to mean that the cattle, the night before they were to be weighed and delivered, were to be placed in a dry lot, without feed or water till weighed. Appellant failed to notify appellee of a time when he would receive the cattle. They were not delivered in consequence, nor was there any tender of them by appellee. This suit was brought to recover of appellant the difference between the contract price and the market value of the cattle on or about September 1, the time when they were to have been received. The plaintiff had verdict and judgment. The defendant appealed.

O'Rear, J. The controlling question is whether a tender of cattle by the seller was necessary to entitle him to maintain his action against the purchaser for a breach of the contract. The seller's right to demand the purchase price of the cattle was dependent on his delivery of them at the time and place stipulated in the contract. He must be, not only able to comply, but, unless excused by the buyer, must offer to comply, by bringing the cattle to the appointed place of delivery. In this case the seller was able and willing to com-

ply, but did not offer to do so. This brings the case up to whether there was an excusing of the seller by the buyer. When the buyer declines to receive the property, or repudiates the contract before the time of delivery, a tender would be unnecessary, because useless. Although the buyer might have changed his mind if the goods had been delivered at the time and place fixed in the contract, yet it does not lie in his mouth to say so, having previously declined and thereby put his adversary off guard. He would not be allowed to play fast and loose with the contract in that way. So when he absents himself from the place of delivery, making a tender futile, the other party is absolved from making the tender. The office of the tender is to give the other contracting party an actual chance to comply with the contract. It would be as vain to tender cattle at the agreed place and time, when the purchaser had purposely absented himself and had no representative there to receive them, as to tender them when he had previously repudiated the contract, and declared that he would not accept them. As appellant was absent from the place of delivery on every day when a tender of the cattle could have been made to him under the contract, and had no one there to represent him in receiving and paying for the cattle, appellee was not bound to go to the trouble and expense of doing a thing that could serve no useful or sensible purpose, and drive the cattle down there, to be again driven back.

Judgment affirmed.

QUESTIONS

1. Suppose that the action in this case had been for the purchase price of the cattle, what would have been the decision of the court?
2. S agrees to sell B ascertained goods, lying in B's warehouse. When does title to the goods pass? Is S under a duty to deliver the goods? When and where must delivery or tender of delivery be made?
3. The goods in the foregoing case are in the possession of X, and this fact was known to B. When does title pass? Is S under a duty to deliver? When and where must he make a delivery?
4. The goods are in X's warehouse. S delivered to B a warehouse receipt indorsed in blank. S sues B for the price of the goods. B contends that he is not liable because S never delivered the goods to him. What decision?
5. S sells B ascertained goods stored in S's warehouse. Before B came after the goods, the warehouse and all its contents burn. S sues B for the price of the goods. B contends that there was no delivery. What decision?

6. B orders goods from S. S separates them from a larger mass of goods of the same kind and ships them to S. The goods are lost in transit. S sues B for the price of the goods. What decision?
7. S sells ascertained goods to B and agrees to deliver them to B at the latter's place of business on the day following. That night the goods are accidentally destroyed by fire. S sues B for the price of the goods. What decision?
8. At B's order, S ships goods to B. While in transit the goods deteriorated in value due to improper packing on the part of S. S sues B for the price of the goods. What decision?
9. In what different senses is the word *delivery* used? What kind of delivery is necessary for passing title to property? What kind of delivery is required by the statute of frauds? What kind of delivery is required for the performance of the contract?

BARTON *v.* KANE

17 Wisconsin Reports 37 (1863)

Action to recover the contract price of cigars and tobacco alleged to have been sold and delivered to the defendant by the plaintiff. The plaintiff having introduced his evidence, the defendant moved for a nonsuit on the ground that more goods were shown to have been sent by the plaintiff than the quantity specified in the agreement of sale, while there was no proof of their having been accepted by the defendant. There was a verdict for the plaintiff. Judgment was entered on the verdict from which the defendant appealed.

DIXON, C. J. The motion for judgment of nonsuit should have been granted. The cigars forwarded exceeded the quantity ordered. The order was for 5,000, but the plaintiff sent 5,625. This was no compliance with the order, and imposed no obligation on the defendant, without showing an acceptance in fact by him after the cigars were received, the burden of which was upon the plaintiff. To constitute a delivery to the carrier a delivery to the consignee, so as to pass the title, and make the consignee liable for goods sold and delivered, the goods must correspond in quantity as well as quality with those named in the order. *Bruce* v. *Pearson*, 3 Johns., 534, and *Thompson* v. *Downer*, 2 Hill, 137, are clear upon this question, and though the latter was reversed in the court of errors (6 Hill, 208), the main point of reversal cannot arise here. There can be no pretense that the 625 extra cigars were sent out of an abundance of caution, and

to insure a scriptural compliance with the order. They were sent to fill up the case, and the defendant was charged with their price. To entitle himself to recover under these circumstances, the plaintiff should have shown that the defendant actually received and accepted the cigars sent, upon the terms indicated in the plaintiff's letter notifying him of the consignment.

Judgment reversed and a new trial awarded.

QUESTIONS

1. If the defendant in this case had accepted all the cigars which the plaintiff sent, what would have been the decision of the court?
2. Suppose that the plaintiff had sent only about 4,500 cigars, what would have been the defendant's rights when they arrived?
3. Suppose that the plaintiff had shipped 5,000 cigars but that they were inferior in quality to the cigars ordered by the defendant, what would have been the defendant's rights when they arrived?
4. S sells B 5,000 barrels of oil to be delivered in bulk in cars, with the understanding that B is to pump the oil from the cars. S ships cars containing 6,000 barrels of oil. B refuses to accept any of it. S sues B for the price of 5,000 barrels. What decision?
5. S contracts with B to sell and deliver flour of a certain grade. S ships a very inferior grade of flour. What are B's rights when it arrives?
6. In the foregoing question, the flour is lost in transit. Upon whom does the loss fall?
7. S contracts to sell and deliver 500 tons of hay to B during the months of September and October, to be paid for when all the hay is delivered. S delivers 200 tons in September, but delivers none thereafter. B accepts and uses the 200 tons, thinking that the balance will be forthcoming. S sues B for the price of 200 tons. What decision?
8. S contracts to sell to B 5,000 tons of iron rails to be delivered at about the rate of 1,000 tons a month. In the first month S ships 500 tons; in the second month he ships 800 tons. When B learns of the amounts of these two shipments, he notifies S that the contract is at an end. S sues B for breach of the contract. What decision?
9. In the last question it is agreed that B shall pay for each instalment as it is delivered. S ships about 1,000 tons in the first month, which B fails to pay for on its arrival. Thereupon S notifies B that he will ship no more rails. B sues S for breach of the contract. What decision?

CREAM CITY GLASS CO. *v.* FRIEDLANDER

84 Wisconsin Reports 53 (1893)

Winslow, J. We shall consider but one other question upon this appeal, and that is the question of the effect upon the rights of the parties of the use of six tierces of the soda ash by the plaintiff in January or February following the sale, for the purpose of testing its fitness for the manufacture of glass. Assuming that the evidence is sufficient to establish an implied warranty that the soda ash in question was of a quality reasonably fit to be used in the manufacture of glass, the question is, could the plaintiff after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three-quarters of a ton of the material in making a practical test, and still insist on its right of rejection. It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. Benjamin, *Sales* (6th ed.), section 703. If this fact could only be ascertained by a practical test, the plaintiff also had the right within such reasonable time, to make such a practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. Benjamin, *Sales* (6th ed.), section 896; *Philadelphia Whiting Company* v. *Detroit White Lead Works*, 58 Mich. 29. But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now, in this case, the plaintiff's officers determined at once and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. *Churchill* v. *Price*, 44 Wis. 540. They must do no act which they would have no right to do unless they were owners of the goods. Benjamin, *Sales* (6th ed.), section 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for

the purpose of providing evidence of unfitness for the purposes of the trial of the case, but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by the defendant. It follows that the judgment must be reversed.

Judgment reversed.

QUESTIONS

1. What did the court decide in this case—that the plaintiff by making the practical test became purchaser of the soda ash or that the test was a conversion of the defendant's property?
2. S sells B a consignment of syrup. When delivery is tendered, B wishes to open one of the receptacles to inspect the syrup. S denies him the right to do so. B refuses to accept the delivery. S sues B for the price of the syrup. What decision?
3. S sells and ships B syrup. Upon arrival, B makes an inspection and finds that it does not conform to the sample by which it was sold. What are B's rights under the circumstances?
4. B, a candy manufacturer, buys 500 pounds of sugar from S. B uses 25 pounds in making a batch of candy. Finding that the sugar is not of the quality it was warranted to be, he ships back to S 475 pounds. What are S's rights against B?
5. S sells goods to B and ships them C.O.D. by the X Company. B refuses to pay for them because the carrier will not permit him to inspect the goods before payment. The goods are destroyed by fire that night while still in the possession of the carrier. S sues B for the price of the goods. What decision?
6. What are the rights of the unpaid seller of personal property against the buyer?

CHAPTER III

MARKET PRACTICES

1. Practices Prejudicial to a Competitor

a) Practices Injurious to a Competitor's Business Organization

WALKER *v.* CRONIN

107 Massachusetts Reports 555 (1871)

Tort, brought in the Superior Court. The defendant demurred. The Superior Court sustained the demurrer, and the plaintiff appealed.

WELLS, J. The declaration, in its first count, alleges that the defendant did, "unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons who were in the employment of the plaintiffs," and others, "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiffs, without their consent and against their will"; whereby the plaintiffs lost the services of said persons, and the profits and advantages they would otherwise have made and received therefrom, and were put to large expenses to procure other suitable workmen, and suffered losses in their said business.

This sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting.

Everyone has an equal right to employ workmen in his business or service, and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be

held liable for the wrong; although he did it for the purpose of promoting his own business.

Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing and falls within the principle of the authorities first referred to.

The second and third counts recite contracts of the plaintiffs with their workmen for the performance of certain work in the manufacture of boots and shoes; and allege that the defendant, well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to perform their contracts, whereby the plaintiffs suffered great damage in their business.

It is a familiar and well established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description.

Upon careful consideration of the authorities, as well as of the principles involved, we are of opinion that a legal cause of action is sufficiently stated in each of the three counts of the declaration.

Demurrer overruled.

QUESTIONS

1. "So far as appears from the reported cases, inducing a competitor's employee to leave his service and take employment with a rival has been little resorted to as a competitive method. A few cases have arisen, both in this country and in England, where in an effort to cripple

a rival his employees have been induced to leave his service, but such instances are rare outside of labor unions." Why do you suppose this is so?

2. Does it appear in this case why the defendant induced the plaintiff's employees to leave him?
3. Did defendant induce plaintiff's employees to leave because of labor difficulties? Was it because he needed employees? Or was it a case of wilful interference? What difference would it make in any event?
4. Would not the plaintiff have had a remedy against his employees for breaking their contracts? Why give him an additional remedy against D?
5. In this class of cases what is meant by the allegation "that the defendant maliciously" caused the plaintiff's employees to break their contracts of employment?
6. X is under a contract of employment with P. X goes to D in search of new employment. D, knowing that X has a contract with P, offers him employment. P sues D. What decision?
7. D, a piano manufacturer, invited the workmen of P, a rival manufacturer, to dinner. After causing them to become intoxicated, he induced them to sign contracts of employment with him. The workmen were not employed by P for a determinate period, but worked by the piece. P sues D for damages. What decision?

COHEN *v.* KUSCHKE AND COMPANY

83 Law Times Reports N.S. 102 (1900)

This was a claim by the plaintiff to recover £38, a sum paid by the defendants Kuschke and Company to the defendant Koenig, being a sum paid by way of secret commission to Koenig, who was engaged as the plaintiff's buyer. It was not disputed at the trial that the sum of £38 was paid by Kuschke and Company to Koenig, but the question in dispute was whether it was a sum of money paid in pursuance of a bargain made by Koenig for the purchase from Kuschke and Company of a parcel of thirty-two bales of Sumatra tobacco, or was a mere gratuity paid to Koenig as a Christmas box or as a present.

The defendant contended that it was a mere gratuity and that it had no relation to the contract by Koenig for the purchase of the thirty-two bales.

The learned judge left to the jury the following question, whether a term of the bargain was a promise to pay Koenig *3d.* in the pound by way of secret commission and whether payment was made in pursuance of such promise. They answered that in the affirmative,

and he thereupon entered judgment for the plaintiff against the defendant Koenig.

Bruce, J. The question now arises, is the plaintiff entitled to judgment against the defendant Kuschke and Company? It was contended by Mr. Bankes on behalf of the defendants, Kuschke and Company that, as there was no evidence that the price of the thirty-two bales had been enhanced by the amount of the commission, Kuschke and Company are not liable. But I cannot agree with that contention. It is clear that Kuschke and Company knew perfectly well that Koenig was the plaintiff's agent and was buying the thirty-two bales for him, and it is quite clear from the evidence of the defendants that the money paid to Koenig was paid to him intending that he should have the benefit of it. Indeed, as I have said, the case of Kuschke and Company is that the £38 was a present to Koenig. If the money paid was not a mere gratuity, the defendants Kuschke and Company must have paid it as a secret commission, and in those circumstances, I think it matters not whether a different price would have been obtained had there been no bargain for a commission. In this sale it was a term, it entered into the bargain, that a sum of money which was part of the apparent or pretended price of the goods was to be paid over to Koenig, for his own use. That money was in law not Koenig's money, but it was the money of the plaintiff. And if the defendants Kuschke and Company paid over to Koenig, with knowledge of the circumstances, money which was the plaintiff's money, intending that Koenig should keep it for his own use and that the plaintiff should be kept in ignorance of the payment, I think they are liable to the plaintiff for the amount. The plaintiff cannot, of course, recover the money twice over, but he is entitled to recover it against either or both of the defendants, and he is entitled to judgment against Kuschke and Company for £38 and costs.

Judgment accordingly.

QUESTIONS

1. The court says in the principal case that the money paid to the agent was the plaintiff's money. If so, how did the agent hold it? If so, why does the court permit the plaintiff to recover a judgment against the defendant for the sum of money?
2. X authorizes and directs A to sell certain stock and promises him a commission. Y, knowing that A is acting for X, buys the stock and promises him a commission. (*a*) A is suing X for his commission. (*b*) A is suing Y for his commission. What decision in each case?

3. X authorizes A to sell goods for him and promises him a commission. Y authorizes A to buy goods for him and promises a commission. A sells goods to Y on behalf of X. Each pays A a commission, ignorant that A was acting in a double capacity. Each sues A for return of his commission. What decision in each case?
4. In the foregoing case Y knew but X did not know that A was acting for both. Each sues A for return of the commission paid. What decision in each case?
5. X authorizes A to sell goods for him. Y, ignorant of the foregoing fact, authorizes A to buy goods of similar kind for him. On behalf of X, A enters into a contract to sell goods to Y. Later X and Y discover that A was acting for both. What are the respective rights of X and Y under the contract between them?
6. Suppose in the foregoing case that Y knew but X did not know that A was acting for both. What would be X's rights under the contract? Y's rights under the contract?
7. X authorizes A to find a purchaser for certain goods and promises him a commission. Y authorizes A to find a seller of the same kind of goods and promises him a commission. A brings X and Y together and they make their contract of sale. A sues each for commission promised. What decision in each case?
8. "A common method of competition is the giving of secret commissions to another's employees for the purpose of securing a preferential treatment in the distribution of the employer's patronage. Notwithstanding the fact that the courts have permitted the principal to recover the amount of the commissions so received, and to repudiate contracts made under such circumstances, it has been considered necessary in several states in this country and in other English-speaking countries further to discourage the practice by making it a criminal offense." Why have the common law rules failed to check this practice?

b) Direct Attacks on a Competitor's Trade Relations

RICE *v.* MANLEY

66 New York Reports 82 (1876)

Appeal from order of the General Term of the Supreme Court in the Fourth Judicial Department reversing a judgment in favor of plaintiffs, entered upon the report of a referee.

EARL, J. The plaintiffs had made an agreement with one Stebbins to purchase from him a large quantity of cheese, to be delivered at a future day, at Cattaraugus station, Cattaraugus county. There had been no compliance with the statute of frauds so as to

make the agreement binding upon either party, but both parties would have performed it but for the fraud of the defendant. The defendant knowing of the agreement, for the fraudulent purpose of defeating its performance by Stebbins, of depriving the plaintiffs of the benefit thereof, and of himself obtaining the cheese, caused a telegraphic dispatch to be sent to Stebbins, signed by the name of E. Rice, which he meant Stebbins should understand to be the name of one of the plaintiffs, to the effect that he could not sell the cheese and plaintiffs did not care for it. He took the dispatch from the telegraph office and carried it to Stebbins, and by this fraud induced Stebbins to sell and deliver the cheese to him before the day of delivery to the plaintiffs arrived. The referee held that defendant was liable to the plaintiffs for the damages sustained by them in consequence of the fraud; but the General Term reversed the judgment, holding, upon the authority of the case of *Dung* v. *Parker* (52 N.Y. 494), that the plaintiffs could recover no damage, because the agreement for the sale of the cheese to plaintiffs, by Stebbins, was void by the statute of frauds.

What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would have performed the agreement and that plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damages, so as to satisfy the rule laid down by Coke, J., that "fraud without damage or damage without fraud gives no cause of action; but when both these two concur an action lies"? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such a case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish appropriate relief against B, depending upon the facts of the case. (Kerr on *Frauds*, 274, and cases cited.)

In *Snow* v. *Judson* (38 Barb. 210), it was held that false statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do, in fact, prevent such sales and injure the manufacturers in

their business, constituted a cause of action. It has been held in many cases that a false representation, made with intent to injure one, and in relying on which he is injured, is a good cause of action, although no benefit accrues to the party making it, from the falsehood. (*Pasley* v. *Freeman*, 3 Term R. 51; *White* v. *Merritt*, 7 N.Y. 352.) In the latter case it is said that the action will lie whenever there has been an assertion of a falsehood with a premeditated design, as to a fact, when a direct and positive injury arises from such assertions; and *Benton* v. *Pratt* is cited as authority. In *Green* v. *Button* (2 C.M. & R. 707) the plaintiff had made a contract for the purchase of spruce battens for £11; upon the case, as presented to the court, the battens had not been delivered and paid for. The defendant, who had loaned the plaintiff the money to pay for the battens, went to the sellers and falsely and fraudulently represented, among other things, that he had a lien on the battens, and ordered and directed them not to deliver them. The seller, being deceived by the representations, was induced not to deliver the battens, and the plaintiff suffered damage; and it was held that an action for the fraud could be maintained, although the sellers were under no obligation to deliver the battens.

Order reversed and judgment accordingly.

QUESTIONS

1. What was the nature of the action brought in this case? With what wrong was the defendant charged?
2. What would have been the decision if the defendant had merely persuaded Stebbins to sell the cheese to him instead of selling it to the plaintiffs?
3. Suppose that the defendant had induced the sale to him by an offer to Stebbins of a higher price than the plaintiffs had offered, what would have been the decision of the court?
4. Suppose that the defendant had induced the sale to him by violence or threats of violence to Stebbins, what would have been the decision in this case?
5. Suppose that the defendant had induced Stebbins by an offer of a higher price to sell the cheese to him in ignorance of the fact that Stebbins was under a contract to sell it to the plaintiffs, what would the decision have been?
6. D knows that X and others have contracts to buy services from P. D is attempting to persuade them to break their contracts with P and to enter into similar agreements with him. As an inducement, D offers

to indemnify X and others against any damage they may suffer by breaking their contracts with P. What are P's rights, if any, against D?

7. D, knowing that X and others have these contracts, is attempting to persuade these various persons to break their contracts with P and to enter into similar relations with him. D is doing this to build up his own business and honestly believes that he can serve them better than P can. P brings a bill in equity asking that D be enjoined from continuing such activities. What decision?
8. In the foregoing case, D has already enticed many of P's customers away. What are P's rights against D?
9. S is about to sell goods to P but has not entered into a contract to do so. S is induced by an offer of a higher price for the goods to sell them to D, who knows of the negotiations between P and S. P sues D for damages. What decision?

MOGUL STEAMSHIP COMPANY *v.* McGREGOR

Law Reports 21 Queen's Bench Division 544 (1888)

Law Reports 23 Queen's Bench Division 598 (1889)

In this case it appeared that certain steamship lines engaged in carrying between the Orient and England, desiring to enjoy exclusively the carrying of tea from China, entered into an agreement regulating this traffic as between themselves and providing for a division of cargoes and the determination of the rates of freight. The agreement also provided for (1) the semi-annual payment of a rebate of 5 per cent to such persons as shipped exclusively by their vessels; (2) sending their steamers to Hankow (and interior shipping points) whenever an "outside" vessel started there, to secure freight without regard to whether the rate would be remunerative or not; and further provided that agents of the parties to the agreement should be prohibited from being interested in competitive steamers or from loading vessels belonging to outsiders. The plaintiffs in this case desired to become parties to the agreement, and being excluded sent their vessels to Hankow, where they were obliged to accept cargoes at unremunerative rates. The plaintiffs brought an action claiming damages and asking for an injunction.

Lord Coleridge, C. J., at *nisi prius* (21 Q.B.D. 544), said:

The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful

means. They have a right to endeavor by lawful means to keep their trade in their own hands and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, of bribing, I see no evidence; of inducing, in the sense in which the word is used in the class of cases to which *Lumley* v. *Gye* [2 E. & B. 216] belongs, I see none either. One word in passing only on the contention that this combination of the defendants were unlawful because it was in restraint of trade. It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers 5 per cent off their bills at Christmas on condition of their customers' dealing with them and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question. It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering [I give examples only], men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference, in 1885 they excluded them, and they were determined, no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill-will to the plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it they thought, and honestly, and as it turns out, correctly thought, that for a time at least there would be an end of their gains.

In affirming this view (L.R. 23 Q.B.D. 598) in the court of appeal, BOWEN, L. J., said:

They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a personal intention to harm, it is sufficient to reply [as I have already pointed out] that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendant's ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excluse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of "fairness" or "reasonableness" [to be determined by the internal consciousness of judges and juries] beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiff's counsel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight"? It is said that it ought to be normal rate of freight, such as is reasonably remunerative to the ship owner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship owners or merchants were ever deemed to be by law bound to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go and no farther." To attempt to limit English competition in this way would probably be as

hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. *Sic utere tuo ut alienum non laedas.* If engaged in actions which may involve dangers to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable; see *Chasemore* v. *Richards* [7 H.L.C. 349]. If there is no such fetter upon the use of property known to the English law, why should there be any such fetter upon trade? In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of Rolls. The substance of my views is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I, myself, would deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness" or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform.

QUESTIONS

1. What was the wrong complained of in the principal case? What relief was sought by the plaintiff? Did the court grant the relief prayed for? If not, why not?
2. Were the defendants in this case attempting to induce customers of the plaintiffs to break their contracts? If not, what were the defendants doing?
3. What end were the defendants seeking? Was this end legitimate? What means were being used to gain the end? Did the court lay down any standard to test the reasonableness and fairness of means for attaining legitimate ends?
4. Suppose that the defendants had been actuated primarily by a desire to secure control over the tea-carrying business and secondarily by ill will toward the plaintiffs, would the decision of the court have been the same?
5. P and D are rival traders in a certain city. In attempting to divert trade from P to himself, D engages in the following practices: (*a*) he advertises low prices in the daily newspaper; (*b*) he distributes handbills in P's vicinity, advertising low prices; (*c*) an agent of D solicits trade of people going into P's place of business and out of it; (*d*) this agent tells prospective customers of P that P is a dishonest dealer; (*e*) D sends a large group of people to the vicinity of P's place of busi-

ness who threaten P's customers with violence. What are the rights of P, if any, against D in connection with each of the foregoing practices?

6. P and D are rival traders. In order to drive P out of business as a competitor, D cuts his prices far below cost. Having driven P out of business, D raises his prices above the former level. What remedy, if any, has P against D?
7. P and D are both engaged in selling hats of the same manufacturer. D advertises a sale of hats below the usual retail price and assigns as a reason therefor that he is going out of business. As a matter of fact, he does not go out of business but continues to buy hats of the same kind to sell at the advertised prices in his "forced sale." To what relief, if any, is P entitled?
8. Assuming that practices like those under consideration in the principal case are condemned by the moral sense of the community, and assuming that the offenders should be brought under the control of the law, does the common law, as it is constituted, possess the proper kind of machinery for dealing with them? If not, what kind of machinery is needed? At the present time, have we any machinery of the kind needed?

MARTELL *v.* WHITE

185 Massachusetts Reports 255 (1904)

Tort for an alleged conspiracy to injure the plaintiff in his business of quarrying and selling granite, carried on by him at Quincy. Writ dated March 9, 1899.

In the Superior Court the case was tried before BISHOP, J., who, at the conclusion of the evidence, ruled that the plaintiff could not recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute. The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined through the action of the defendants and their associates.

The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Massachusetts, and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become manufacturers, quarriers, or polishers

of granite." There was no constitution and, while there were by-laws, still, except as hereinafter stated, there was in them no statement of the objects for which the association was formed. The by-laws provided among other things for the admission, suspension, and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows:

For the purpose of defraying in part the expense of the maintenance of this organization, any member hereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite [hand polishers excepted], shall for each of said transactions contribute at least $1 and not more than $500. The amount to be fixed by the association upon its determining the amount and nature of said transactions.

Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and under the section quoted above it was voted that the offending parties should respectively "contribute to the funds of the Association" the sums named in the votes. These sums ranged from $10 to $100. Only the contribution of $100 has been paid, but it is fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as stated above, and to their fear that a similar vote for contribution would be passed should they continue to trade with the plaintiff.

The jury might properly have found also that the euphemistic expression "shall contribute" to the funds of the association contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions recites that "there was no evidence of threats or intimidation practiced upon the plaintiff himself, and the acts complained of were confined to the action of the

society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiffs' customers as were members, and that no pressure was brought to bear upon the plaintiff except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against him alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts.

Here, then, is a clear and deliberate interference with the business of a person with the intention of causing damage to him and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business and they accomplished their purpose. In all this have they kept within lawful bounds?

It is elemental that the unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world and indeed those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things at least appear to have been settled, and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that while a person must submit to competition he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker* v. *Cronin*, 107 Mass. 555, 564, in the following language:

Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise

is interfered with. But if it come from the merely wanton or malicious acts of others without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing.

In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. Bowen, L. J., in *Mogul Steamship Company* v. *McGregor*, 23 Q.B.D. 598, 613; *Plant* v. *Woods*, 176 Mass. 492. The justification must be as broad as the act and must cover not only the motive and the purpose, or in other words the object sought, but also the means used.

The defendants contend that both as to object and means they are justified by the law applicable to business competition. In considering this defense it is to be remembered, as was said by Bowen, L. J., in *Mogul Steamship Company* v. *McGregor*, 23 Q.B.D. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound and to be sustained within proper bounds, but each of which must finally yield to some extent to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which at least the line must run and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure upon the evidence. The association had no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine; from which it may be inferred that it is the idea of the members that for the protection of their business it would be well to confine it to the transactions among themselves, and that one at least of the objects of the association

is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employees and between this association and similar associations in the same line of business be kept and "lived up to." Whether this failure to set out fully in writing the objects is due to any reluctance to have them clearly appear, or to some other cause, is of course not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then so far as respects the end sought the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion the day may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J., in the Mogul Steamship case, *ubi supra*, page 616, "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based

on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See also opinion of STIRLING, L. J., in *Giblan* v. *National Amalgamated Laborers' Union* (1903) 2 K.B. 600, 621. Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the Mogul Steamship case cited above, and in *Bowen* v. *Matheson*, 14 Allen, 499. The fact, therefore, that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare.

It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation and that this end is best attained when the trader is allowed in his business to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of BOWEN, L. J., in the Mogul Steamship case, *ubi supra*, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to reap a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others, and so long as he keeps within the operation of the laws of trade his justification is complete.

But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapon used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, or by intimidation, obstruction, or molestation. In the case before us the members of the association were to

be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or in other words they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but on the contrary it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. *Carew* v. *Rutherford*, 106 Mass. 1.

In view of the considerations upon which the right of competition is based, we are of opinion that as against the plaintiff the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal instrument. In many cases it is so slight as not to be coercive in its nature; in many it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and in many it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature but conditional, and is inconsistent with the conditions upon which the right rests, then the coercion becomes unjustifiable and taints with illegality the act.

The defendants strongly rely upon *Bowen* v. *Matheson*, 14 Allen, 499; *Mogul Steamship Company* v. *McGregor*, 1892 A. C. 25; *Bohn Manufacturing Company* v. *Hollis*, 54 Minn. 223; *Macauley Brothers* v. *Tierney*, 19 R. I. 255; and *Cote* v. *Murphy*, 159 Penn. St. 420. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition for instance, more advantageous terms in the way of discounts, increased

trade, and otherwise. In the Minnesota case there was, among the rules of the association, a clause requiring the plaintiff to pay 10 per cent, but the propriety or the legality of that provision was not involved. In *Bowen* v. *Matheson*, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are lawful and proper, and as no illegal methods are stated the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines. As to the other cases cited by the defendant it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent with the conclusion to which we have come. Among the authorities bearing upon the general subject and having some relation to the questions involved in this case, see in addition to those hereinbefore cited, *Slaughter-House Cases*, 16 Wall. 36, 116; *Addyston Pipe & Steel Company* v. *United States*, 175 U.S. 211; *Doremus* v. *Hennessy*, 176 Ill. 608; *Inter-Ocean Publishing Company* v. *Associated Press*, 184 Ill. 438; *State* v. *Stewart*, 59 Vt. 273; *Olive* v. *Van Patten*, 7 Tex. App. 630; *Barr.* v. *Essex Trades Council*, 8 Dick. 101; *Jackson* v. *Stanfield*, 137 Ind. 592; *Bailey* v. *Master Plumbers*, 103 Tenn. 99; *Brown* v. *Jacob's Pharmacy Company*, 115 Ga. 429; *Mogul Steamship Company* v. *McGregor*, 15 Q.B.D. 476; 21 Q.B.D. 598.

For the reasons stated above, a majority of the court are of the opinion that the case should have been submitted to the jury.

Exceptions sustained.

QUESTIONS

1. What was the end sought by the agreement in the principal case? Is this end worthy of protection by law? What were the means used to attain the end? Are these means fair and legal?
2. Did not each member of the association have the right to refuse to deal with the plaintiff? If so, why may they not combine and refuse as a combination to deal with him?
3. Suppose that the association, instead of levying fines to prevent its members from dealing with non-members, had simply used its power of persuasion to accomplish the end sought, would the decision have been the same in the principal case?

4. All the retail dealers of the state of South Dakota organize and agree that they will not purchase merchandise from any wholesaler or jobber who sells goods to a catalogue or mail-order house. P, a large mail-order concern, brings a bill asking that the association be enjoined from continuing its activities because it is a conspiracy to injure and boycott its business. What decision?
5. P and D are rival taxi-cab companies. D's drivers are instructed to follow P's cabs closely to secure as much of P's patronage as possible. This results in so much annoyance to P's prospective patrons that his business falls off very considerably. What, if any, remedy has P against D?
6. D is the owner of a great many patents for improvements of spring-tooth harrows. He is not a manufacturer but grants licenses to manufacturers upon royalties to use his patents. P is a manufacturer of a spring-tooth harrow built conformably to a patent under his control. D makes a practice of writing to all of the customers and prospective customers of P, alleging that P is infringing upon patents under his, D's, control, and warning them that suits will be brought if such infringements continue. D, however, does not bring any suits. P asks that D be enjoined from sending out these communications on the ground that they are causing irreparable damage to his business. What decision?

TUTTLE *v.* BUCK

107 Minnesota Reports 145 (1909)

Action in the District Court for Wright County to recover $10,000 damages. Defendant demurred to the complaint on the ground that it did not state a cause of action. From an order of Buckham, J., overruling the demurrer, the defendant appealed. Affirmed.

It appeared that the plaintiff, a barber, had for several years carried on a profitable business, and that the defendant, a wealthy banker, possessed of great influence, set up an opposition shop, solely for the purpose of injuring the plaintiff, and without profit to himself, employing and paying barbers to conduct such opposition business, whereby the plaintiff's business was ruined.

Elliott, J. It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must

change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance have been greatly affected by prevalent economic theories.

For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statute. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business competition. The problem has been so to adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person.

It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and ill adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

A majority of the justices are of the opinion that on the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

QUESTIONS

1. What was the end sought by the defendant in this case? Is this end worthy of protection by law? What means did he use in attaining the end? Are these means unfair?
2. P, a retail oil dealer, had been buying oil from D, a wholesaler. P began to buy his oil from X, a rival of D in the wholesale oil business. D opened up a retail oil business in competition with P and, by cutting prices, drove P out of business. As soon as P went out of business D closed his retail business and gave his attention as before to his wholesale business. What are P's rights against D?
3. P operated a restaurant near the roundhouse of the D Company. Out of ill will toward P, the D Company threatened to discharge any of its employees who patronized the restaurant of P. P sues D for damages. What decision?
4. D was the employer of a large number of people and in connection with his business operated a general mercantile store for the purpose of selling goods to his employees and others. P carried on a mercantile business in the same vicinity. D notified his employees that if they bought goods of P they would be discharged. P sues D for damages. What decision?
5. D and X, engaged separately in buying and slaughtering cattle for the retail market, agreed not to sell meat to P on credit or for cash. They entered into this agreement because P owed each of them money and would not pay it. P sues D and X for damages, proving that this agreement had ruined his business. What decision?

WILLIAMS *v.* FARRAND

88 Michigan Reports 473 (1891)

McGrath, J. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm has no support in principle. A retiring partner conveys in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested, and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first

year's business will show loss instead of profit. For a time at least, it is capital awaiting investment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue to have the benefit of his name, reputation, or service; nor does he guarantee the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. Parsons, *Partn.* 409. He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities, not assurances. It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he sold; but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality—next door, if you please—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to engage again in the same line of business include all the incidents of that right? Upon what principle is the line arbitrarily drawn at the *personal* solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so agreed, there is no restraint upon that right.

In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to engage again in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition made to complainants was not to sell, but to buy.

In *Ginesi* v. *Cooper*, 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the

public, and the case is without support in that respect. In *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, the court says that a retiring partner who sells the good-will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business; but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm.

But in *Pearson* v. *Pearson*, 27 Ch. Div. 145, *Labourchere* v. *Dawson* is expressly overruled. The court says:

The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their comtemplation. It is said that there was a sale of the good-will. I think that there was, taking good-will as defined by Lord Eldon in *Cruttwell* v. *Lye*, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good-will, as defined by Lord Eldon. But the term "good-will" is not used; and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of a sale of "good-will?" It does not, per se, prevent the vendor from carrying on the same class of business.

The correct rule is, we think, laid down in *Cottrell* v. *Manufacturing Co.*, 54 Conn. 138 (6 Atl. Rep. 791). The court says:

Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacture of printing-presses. By purchasing the good-will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good-will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good-will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when addressing individuals or the

public, either through the eye or the ear not to lead any one to believe that the presses which he offered for sale *were manufactured by the plaintiffs*, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good-will to establish a like business at the next door, and, by the potential instrumentalities of the newspapers and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, namely personal solicitation. To deny him the use of the newspaper and general circulars is to make successful business impossible, and right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these; and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success: that they ought not upon inference to bar him from trade, either totally or partially, and that all restraint of that nature must come from his positive agreement. And such, we think is the present tendency of the law.

QUESTIONS

1. What is meant by the good-will of a business? How is its value determined?
2. D sells out his business to P. Nothing is said in their agreement concerning the transfer of the good-will of the business. Almost immediately D opens up the same kind of business across the street from the old business. What are P's rights against D?
3. D sells his drug business, including his good-will, to P. A few weeks later D opens up a new drug-store on the opposite corner from his former stand. P sues D for damages. What decision?
4. In the foregoing case, D personally solicits his former customers and promises them the same kind of "service which created the reputation of the drug-store which I formerly owned." P sues D for damages. What decision?
5. P sells out his business to D, including the good-will of the business, and covenants that he will not re-engage in that business in the same community for a period of ten years. Before the expiration of the ten-year period, D opens up a drug-store in violation of the agreement. What are P's rights against D?

6. P purchased from D all the latter's right, title, and good-will in a newspaper route. Within a month after the sale the vendor began to call upon the subscribers on the route with a view to inducing them not to take papers from P but to take them again from him. P sues D for damages. What decision?
7. D sold his milk business, including the good-will of the business, to P. Later D started a new milk business and he and his wife went over the old route and solicited the trade of his former customers. What are P's rights against D?

c) *Disparagement of a Competitor and His Goods*

MELLIN *v.* WHITE

Law Reports 3 Chancery Division 276 (1894)

The plaintiff was the manufacturer and proprietor of the food for infants known as "Mellin's Infants' Food." This food was sold wholesale by the plaintiff in bottles, which were inclosed in paper wrappers, bearing thereon the words "Mellin's Infants' Food" and the plaintiff's trade-mark.

The defendant was a chemist at Portsmouth, and the plaintiff had for some years been in the habit of supplying him with Mellin's food. In 1893 the plaintiff discovered that the defendant had adopted the practice of affixing to the wrappers of the bottles of the plaintiff's food which he sold, a label in the following terms:

NOTICE

The public are recommended to try Dr. Vance's Prepared Food for Infants and Invalids, it being far more nutritious and healthful than any other preparation yet offered, sold in barrels, containing 1 lb. net weight, at 7½*d.* each; or in 7lb. packets, 3*s.* 9*d.* each. Local agent, Timothy White, chemist, Portsmouth.

The defendant was, in fact, the proprietor of Dr. Vance's Prepared Food. The plaintiff, by his statement of claim, alleged that Dr. Vance's food was far inferior to the plaintiff's in nutritiveness and healthfulness for infants and invalids, and that the statement on the label to the contrary was untrue, and was made for the purpose and with the object of depreciating the plaintiff's food, and of inducing persons in the habit of purchasing and using it to believe that it was an inferior article, and to purchase Dr. Vance's food instead. The plaintiff further alleged that the statement on the label that the defendant was "an agent" was untrue; and the plaintiff claimed an injunction

to restrain the defendant from offering the plaintiff's food for sale otherwise than under the original labels and wrappers, or offering it for sale, under the plaintiff's labels and wrappers, with any unauthorized variations, and from untruly stating or representing to persons purchasing, or about to purchase, the plaintiff's food, or to the public generally, that the plaintiff's food was not nutritious or healthful, or that the plaintiff's food was less nutritious or healthful than Dr. Vance's.

The case came on for trial before JUSTICE ROMER on April 3, 1894. The plaintiff adduced medical evidence to show that his food was much more wholesome and nutritious, especially for infants under six months, than Dr. Vance's. In the turn which the case took the defendant's evidence was not heard. JUSTICE ROMER dismissed the action. The plaintiff appealed.

LINDLEY, L. J. I think in this case the learned Judge has gone too far in giving judgment for the defendant upon the materials which were laid before him. He appears to have proceeded on the ground that, even if the plaintiff's evidence stood uncontradicted, this action could not in point of law be sustained. I think that is going too far. The defendant has brought upon himself a new form of attack by adopting a new mode of carrying on business. Nobody in this court, at all events, has ever seen or heard of a tradesman selling goods in the bottles and with the labels used by the manufacturer, and putting on them labels which disparage the article contained in the bottles. It is quite a new idea. I do not say it is illegal. I do not say it is overstepping the mark. But if, upon hearing the whole of the evidence to be adduced, the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods to the disparagement of them, and if that statement has caused injury to, or is calculated to injure the plaintiff, this action will lie.

The facts have not been ascertained. The law applicable to the case is to be found in the *Western Counties Manure Company* v. *Lawes Chemical Manure Company*, Law Rep. 9 Ex. 218, and in *Thomas* v. *Williams*, 14 Ch. D. 864, to which may be added *Ratcliffe* v. *Evans*, (1892) 2 Q. B. 524; and it is having regard to those decisions that I have enunciated the proposition that if the facts I have mentioned are found in the plaintiff's favor an action for an injunction will lie.

Under these circumstances as we cannot without the consent of both parties take a short cut, we must discharge the order, direct a

new trial and order the costs of the previous trial and of this appeal to abide the event of the new trial. If the learned Judge thinks it right, he can try the action himself. If he thinks it right he can direct an issue to be tried before a jury. We leave that entirely to him. The case must go back for a new trial, in order that the facts may be fully ascertained.

QUESTIONS

1. The court reversed the decision of the lower court and sent the case back for a new trial. What issue did the higher court direct the lower court to determine on the second hearing?
2. Suppose that on the second hearing in the lower court it shall appear that the statements in controversy are false, will the plaintiff be entitled to recover without alleging and proving special damages?
3. Assume the notice published by the defendant to have been false, would he have been liable in damage in case he had published the same notice in a newspaper? Why or why not?
4. Assume that the defendant's statement is false, and that the publication causes special damage to the plaintiff, can the defendant escape responsibility therefor on the ground that he is a competitor of the plaintiff and that he is honest in his belief that his product is more wholesome and nutritious for infants than the plaintiff's?
5. P was a manufacturer and dealer in pianos. D, a rival manufacturer, kept in his exhibition room one of P's pianos which was out of tune and badly in need of repairs. D never said anything about the instrument to anyone; but prospective purchasers while in the exhibition room frequently examined and compared it with D's pianos. What rights, if any, does P have against D?
6. D, in an article concerning a dinner which P had served, said that it was a "wretched" affair, was served "in such a way that even hungry barbarians might justly object," and that "the cigars were simply vile and the wines not much better." P sues D for damages. He proves that the statements are false, but does not prove any special damages as a result of their publication. What decision?
7. D, in an advertisement, states: "My soothing syrup is the best on the market." Assuming that P, a rival dealer, can prove that the statement is false, can he recover damages from D?
8. D says: "All other soothing syrups contain a greater or less quantity of opium." What other facts must P allege and prove in order to recover damages from D?
9. X asks D, a physician, about P's soothing syrup. D says that it is very bad for infants because it contains harmful ingredients. What other facts must P allege and prove in order to recover damages from D?

HUGHES *v.* SAMUELS BROTHERS

179 Iowa Reports 1077 (1917)

Action to recover damages for an alleged libel. Opinion states the case. Demurrer to petition sustained. Plaintiff elected to stand on his petition. Thereupon, his petition was dismissed, and judgment entered against the plaintiff for costs. Reversed.

Gaynor, C. J. Plaintiff and defendants both reside in the city of Storm Lake, and each is and was engaged in the retail furniture business, and, as an incident thereto, carried on a business of undertaking. Defendants are a copartnership. The plaintiff claims that, on the sixth day of October, 1914, the defendants falsely and maliciously composed and published of and concerning the plaintiff the following: "Bear in mind our Undertaking Department. Satisfaction guaranteed. (Signed) H. L. Hughes"; that the defendants caused the same to be printed on a card and mailed to the address of one Albert Cattermole, a citizen and resident of Storm Lake; that, at the time the card was mailed, the wife of the said Cattermole was lying critically ill in a hospital in Storm Lake; that of this fact the defendants had full knowledge at the time they composed and published said statement; they composed and published it for the malicious purpose of injuring the plaintiff in his reputation and business as aforesaid; that the same, as so published, tended to provoke plaintiff to wrath and expose him to public hatred, contempt, and ridicule, and to deprive him of public confidence and esteem and social intercourse; that the same was further published for the malicious and wicked purpose of causing the said Albert Cattermole and members of his family, and others to whom the said card or letter might be known, to believe that plaintiff sent the card, and for the further purpose of inducing the said Cattermole to refrain from patronizing the business of the plaintiff; that the publication was further made for the purpose of inciting indignation and hatred in the minds of said Cattermole and the members of his family toward the plaintiff and his business as an undertaker, and that it did this; that similar cards were sent to other persons under similar circumstances, and for the purposes aforesaid.

To this petition, defendants filed a demurrer, the substance of which is that the plaintiff's petition stated no cause of action; that the words published were not libelous per se, and no special damages are alleged to have been suffered by the plaintiff on account of its pub-

lication. This demurrer was sustained by the court. Plaintiff elected to stand upon his pleading and not to plead further, and his petition was thereupon dismissed and from the action of the court in the premises, plaintiff has appealed to this court.

This case presents but one question: Is the publication charged to have been made by the defendants libelous per se? If the publication as applied to the situation of the parties is libelous per se, then the demurrer was not well taken. Our statute, Section 5086, Code of 1897, provides: "A libel is the malicious defamation of a person, made public by any printing, writing, etc., tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse."

To be libelous, therefore, the publication must be malicious. It must be defamatory, and tend to provoke the person concerning whom it is published, to wrath, or expose him to public hatred, contempt or ridicule. When this card is read, the mind naturally searches for the meaning to be gathered from it, and the impression which its publication would make on the mind, and the purpose of its publication. What is said and what is done always has its proper relation to time, place, conditions, and circumstances. It appears that Cattermole's wife was sick unto death at the time this card was composed by defendants and sent to him. The defendants knew this fact at the time they composed and mailed the card. We take judicial notice of the fact that the city in which the parties resided was not so populous that the active business men of the city were not known to each other and to the general public. The card was so framed and mailed by the defendants as to lead the receiver to believe that the plaintiff had composed and mailed it, and this was their purpose in mailing it. What possible reason could they have in preparing and publishing this card? Was it to help a rival? Was it to exploit the business of a rival? Was it intended as a letter of credit to the public by which he would be better installed in its confidence and esteem? Is this the usual and ordinary course of procedure on the part of rival business firms? With the largest charity, we cannot think this was the purpose of the publication. What, then, was the purpose in the minds of these defendants when they composed and sent these cards to the sick and dying in that community? Was it not, rather, as the petition says, to deprive plaintiff of public confidence and esteem? Was it not, rather, to expose him to public contempt and ridicule? Was it not, rather, to divert business

from the plaintiff through this means and to injure him by such diversion?

Cattermole's wife was sick unto death at the time he received this card—confined in the hospital. What impression would this card make upon his mind? Would it not bring before him the spectacle of a vulture waiting to prey upon the dead—a man without sympathy for the living because he found more revenue in the dead? What is it that these defendants meant by this thing that they have done? What end had they in view? We think, surely, that which the petition charges, to wit, to injure the plaintiff in his reputation and business, to expose him to public contempt or ridicule, to deprive him of public confidence and esteem. What, then, would be the natural and ordinary effect of such a card upon the mind of one to whom it was sent, under the conditions attending Cattermole? Surely it would bring the sender of such a card, under the conditions then existing, into contempt and hatred; and deprive him of public confidence and esteem. Can the thought be entertained for a moment that after the receipt of a card like this, under those circumstances, the receiver would patronize the sender in the event the stricken wife had died? Was it to secure this for the plaintiff that the card was sent? Published words which directly tend to the prejudice or injury of a person in his office, profession, or business, are actionable. *Williams* v. *Davenport*, 42 Minn. 393 (44 N. W. 311).

With no explanation from the defendants, we may rightly assume that they prepared and mailed this card for the purpose hereinbefore indicated, and that the consequences charged in the petition were the consequences that naturally flowed from the thing done. We think the pleading was sufficient to present the question to the jury. As supporting what we have said, see *Call* v. *Larabee*, 60 Iowa, 212; *Hollenbeck* v. *Ristine*, 105 Iowa, 488; *Halley* v. *Gregg*, 74 Iowa, 563, 564. In the latter case, it is said, in substance, that, if the act charged constitutes a libel, as defined by the statute, it is actionable per se. See *Zier* v. *Hofflin*, (Minn.) 53 Am. Rep. 9, in which it is said:

Words which may be innocent of themselves may be rendered libelous by the place and circumstances of their publication, for such place and circumstances may impress on them a meaning and suggestion which, standing alone, they do not have. Thus, though the words here do not perhaps of themselves impute wrong, they might be published in such a place or under such circumstances as to make them capable of naturally conveying the impression that plaintiff had been guilty of dishonest practices, either in contracting the debt or in withholding payment of it. What

meaning they would naturally convey was for the jury to determine in view of the circumstances of their publication.

We find no case directly in point on the questions here considered. We think, however, the plaintiff presented a fair question to the jury, and the court erred in sustaining the demurrer, and the cause is, therefore,

Reversed.

QUESTIONS

1. What was the wrong complained of in the principal case? What are the elements of the offense? Did the plaintiff show that he had suffered special damages? If not, why is he entitled to recovery?
2. Suppose that the defendant had gone to the home of Cattermole and, representing that he was the plaintiff, had solicited business under the circumstances of the principal case, would the decision have been the same?
3. P was a representative of the X Company, selling its cash registers. D, a rival company, published the following statement in the territory where P was working: "P is no longer with the D Company and has not been for six months. Any contracts made by him for this company will be void." P had never been in the employ of the D Company. (*a*) What are the rights of P against D? (*b*) What are the rights of the X Company against D?
4. D, honestly believing that he is not overstating the facts, falsely says of P, a merchant: "He carries on his business in his sober moments." P sues D for damages, but does not allege special damages. What decision?
5. X, having corn to sell, told D, a miller, who wished to purchase it, that he had previously priced it to P, a rival miller. D said: "Well, you won't want to price it to P but once when he has beat you out of as much as he has beat me of it. He just beat me of a $1,000." The statement is false. P sues D for damages but does not allege special damages. What decision?
6. X asks D, who is a retail clothier, his opinion about some retailer from whom he can buy clothes. D replies: "All I have to say is that I am the only honest retailer of clothes in town." The statement was honest but false. There are two other retailers of clothes in the town and each brings an action against D, but neither alleges special damages. What decision?
7. The Butchers' Union made the following publication: "Protect yourself and family. Don't sow the seed of disease and spread pestilence and death by buying Chinese pork and lard." P who sold Chinese pork and lard brought this action against the union but did not allege special damages. What decision?

EMACK *v.* KANE

34 Federal Reporter 46 (1888)

Blodgett, J. This is a bill in equity, in which the complainant seeks to restrain the defendant Kane from sending circulars injurious to the complainant's trade and business. Both complainant and defendants are manufacturers of what are known as "noiseless" or "muffled" slates for use of school children. The complainant is the owner of a patent issued to one Ebenezer Hunt, February 15, 1870, in which the slate was muffled, or rendered noiseless, as it is said, by making a slot through the frame near the outer edge, into which was spirally wound a piece of listing, cloth, or other fibrous material, which would deaden or break the sound of the slate when it came in contact with the desk or any other hard substance. Complainant is also the assignee of letters patent granted April 3, 1877, to Francis W. Mallett, for a noiseless or muffled slate; the muffling being obtained by encircling the outer edge of the frame of the slate with a strip of wood a little larger than the thickness of the frame, which strip of wood was covered with cloth, or other soft material, so as to muffle both the edges and the faces of the slate frame. The bill also alleges that the defendants are manufacturers of noiseless or muffled school slates—having their place of business in the city of Chicago—under a patent, as they claim, granted March 28, 1877, to Harry C. Goodrich, which was reissued September 26, 1882, with an additional claim. It also appears that this class of goods is sold extensively by both these manufacturers to jobbers, who supply the retail dealers, from whom the slates are purchased for school use; and that the competition between these manufacturers is active and vigorous; that both are seeking to control as much of the trade as possible, or all of it, if they can do so; and that since August 1, 1883, up to the filing of this bill, which was in March, 1884, the defendants have sent out to the trade—that is, to the jobbers and persons engaged in selling this class of slates—circulars threatening all who should buy from the complainant, or deal in his slates, with lawsuits, upon the ground that the complainant's slate is an infringement of the Goodrich patent as reissued. I do not intend to quote all these circulars, but extracts from a few will illustrate the character of the attacks which the defendants have made upon the complainant's business. In a circular issued September 26, 1882, and sent generally to the trade, occurs the following language:

WHAT DO WE PROPOSE TO DO WITH INFRINGERS? Nothing for the present, so far as prosecuting Emack is concerned, and for reasons that the trade will understand. We could stop him, of course, but he would open out the next day in another loft or basement, and under another name, and put us to the expense of another suit, and so on indefinitely. *When we commence suit we want to be sure of damages.* The language of the original patent was somewhat ambiguous, and hence there was some excuse for those who sold it, believing that it was not an infringement. *There can be no mistake now.* The language of the claims could not be made plainer. Any dealer who now sells the Emack slate knows that he is selling an infringement of our patent, and we shall protect ourselves and our friends by holding all who are responsible for royalty and damages.

And in a later circular, addressed to the jobbing trade, defendants wrote:

And now once more we say *we shall not sue Emack.* If this be libel, we take the consequences; but *we do expect and fully intend* to bring suits against those who sell infringing slates. The longer we wait, the more royalty and damages we will collect from those who continue to sell infringing slates.

Many more extracts might be made from these circulars, which appear in the proof, but this is enough to show the spirit in which the defendant attempted to intimidate the complainant's customers from dealing with him, or dealing in slates manufactured by him; and the proof shows abundantly that much business has been diverted from the complainant by these threats and circulars; that the complainant's business has been seriously injured, and his profits very much abridged by the course pursued in sending out these circulars. The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and, after the proofs were taken, and the suits ripe for hearing, the defendants voluntarily dismissed them,—the dismissals being entered under such circumstances as to show fully that the defendants knew that they could not sustain the suits upon their merits; that said suits were brought in a mere spirit of bravado or intimidation, and not with a bona fide intent to submit the question of infringement to a judicial decision.

The defense interposed is—*First,* that these circulars were mere friendly notices to the trade of the claims made by defendants as to what was covered by the Goodrich patent; *second,* that a court of

equity has no jurisdiction to entertain a bill of this character, and restrain a party from issuing circulars, even if they are injurious to the trade of another.

In support of this latter point defendants rely upon the opinion of JUSTICE BRADLEY in *Kidd* v. *Horry*, 28 Fed. Rep. 773, and *Wheel Company* v. *Bemis*, 29 Federal Rep. 95, decided by JUDGES COLT and CARPENTER in the district court of Massachusetts. *Kidd* v. *Horry* was an application for an injunction restraining the defendant from publishing certain circular letters alleged to be injurious to the patent rights and business of the complainant, and from making and uttering libelous and slanderous statements, written or oral, of, or concerning the business of complainant, or concerning the validity of their letters patent, or their title thereto, pending the trial and adjudication of a suit which had been brought to restrain the infringements of said patents; and JUSTICE BRADLEY in deciding the case said:

The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities, such as *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Food Company* v. *Massam*, 14 Ch. Div. 763; *Thomas* v. *Williams*, *id.* 864; and *Loag* v. *Bean*, 26 Ch. Div. 306. An examination of these and other cases relied on convinces us that they depend upon certain acts of Parliament of Great Britain, and not on the general principles of equity jurisprudence. Neither the statute law of this country, nor any well-considered judgment of court, has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming jurisdiction. We do not think that the existence of malice in publishing a libel, or uttering slanderous words, can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel; and no cases of authority can be found, we think, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not.

The principle of this case, concisely stated, is that a court of equity has no jurisdiction to restrain the publication of a libel or slander. But it seems to me the case now under consideration is fairly different and distinguishable from the cases relied upon by the defendants in what seems to me a material and vital feature. In *Kidd* v. *Horry* the owner of a patent sought the interference of a court of equity to restrain the defendants from publishing and putting in circulation statements challenging the validity of his patent, and

of his title thereto, on the ground that such publications were libelous attacks upon his property. Here the complainant seeks to restrain the defendants from making threats intended to intimidate the complainant's customers under the pretext that complainant's goods infringe a patent owned or controlled by defendants, and threats that if such customers deal in complainant's goods they will subject themselves to suit for such infringement, the bill charging, and the proof showing, that these charges of infringement are not made in good faith, but with a malicious intent to injure and destroy the complainant's business. While it may be that the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade, or otherwise, yet, if the owner of a patent, instead of resorting to the courts to obtain redress for alleged infringements of his patent, threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor, and destroying his competitor's business, it would seem to make a widely different case from *Kidd* v. *Horry*, and that such acts of intimidation should fall within the preventive reach of a court of equity.

It may not be libelous for the owner of a patent to charge that an article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the *gravamen* of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not intend to prosecute; and this feature was not involved in *Kidd* v. *Horry*.

I cannot believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain an attack upon property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law, but that might imply a multiplicity of suits which equity often interposes to relieve from; but the still more cogent reason seems to be that a

court of equity can, by its writ of injunction, restrain a wrong-doer, and thus prevent injuries which could not be fully redressed by verdict and judgment at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ.

I am, therefore, of the opinion that the complainant has made a case entitling him to the interposition of a court of equity to prevent the issue of these circulars, or other written or oral assertions, that the slates made by the complainant are an infringement upon the defendants' patent; and a decree may accordingly be entered as prayed in the bill.

QUESTIONS

1. If the complainant had chosen to sue at law, what action would he have brought? What facts would he have been compelled to allege and prove to have recovered?
2. The court said that the complainant's remedy at law would have been entirely inadequate. Precisely why would his remedy at law have been inadequate?
3. If the defendants really believed that the complainant was violating his patent, what remedy or remedies were available to him?
4. Suppose that the defendant had, in good faith but falsely, published the statement that the complainant was infringing the former's patent, what would have been the rights, if any, of the complainant against the defendants?
5. The court in this case, in an omitted portion of the opinion, refused to pass upon the question whether the complainant was infringing upon the rights of the defendants. Why?
6. D repeatedly publishes the statement that P, a retail merchant, is verging upon insolvency. The statement is false. What are P's remedies?
7. D publishes, and continues to publish, the statement that the goods of P are shoddy and inferior in quality. The statement is false. (*a*) What must P allege and prove to recover in a common-law action? (*b*) Is he entitled to an injunction, restraining further publications of the statement by D?
8. What was the decision in *Kidd* v. *Horry*, 28 Federal Reporter, 773, cited in the opinion? Can it be distinguished from the principal case?

d) *Appropriation of a Competitor's Trade Information*

EASTMAN KODAK COMPANY *v.* REICHENBACH

20 New York Supplement Reports 110 (1892)

Appeal by Henry Reichenbach and others from a judgment of the Supreme Court in favor of the plaintiff, upon the decision of the court rendered after trial enjoining and restraining the defendants from using or in any way divulging or imparting any knowledge or information acquired by them in regard to certain processes, formulas, and appliances belonging to the plaintiff.

The plaintiff brings this action to restrain the defendants from using or in any manner disclosing to anyone any secret or information as to any processes or formulas used by the plaintiff in its business of manufacturing photographic supplies, and especially in its business of making emulsions and film, which had been imparted to or acquired by them while in the employ of the plaintiff or its predecessors in business.

The plaintiff is and has been a corporation duly organized, and as such was and is engaged in the business of manufacturing and selling Kodak cameras, photographic films and papers, dry plates and other material and apparatus used in the art of photography, it having succeeded the Eastman Dry Plate Company in the conduct of this business. The defendants were in the employ of the plaintiff, holding responsible and lucrative positions. They were men of education, skill, and experience in their respective departments, and their services were of great value to the plaintiff, in whose interests, it is claimed, they, or two of them, Reichenbach and Passavant, had made certain discoveries and inventions which were of great value and which were unknown to the world at large.

Upon entering the service of the plaintiff, the defendants Reichenbach and Passavant executed a written contract by the terms of which it was stipulated that they and each of them should assign and transfer to the company all inventions, discoveries, or improvements in photography which they respectively might make, discover, or invent while in its employ. There is also evidence tending to show that outside of these contracts it was stipulated that they should regard their relation to the company as strictly confidential, and that they should not disclose or make improper use of any secrets of the business.

While thus employed by the plaintiff, the defendants organized a new company, with a large capital, for the purpose of engaging in

the same business as that carried on by the plaintiff, and issued a prospectus of their enterprise, in which the announcement was made that the "Corona Camera Company" had been incorporated for the manufacture and sale of "photographic novelties and specialties" which announcement was followed by a list of some of the leading "specialties and novelties" which it was proposed to manufacture and sell. Among the articles thus enumerated were a "Corona film" and "bromide paper," the latter of which, it was stated in the prospectus, the projectors of the new company were peculiarly prepared to place upon the market by reason of "having manufactured and sold it for a manufacturer that has, at present, the market monopoly."

The plaintiff upon learning of the intentions of the defendants respecting the formation of a new company, and upon having seen the contents of their prospectus, discharged them from its employ, and then resorted to a court of equity for the relief which it seeks to obtain through the medium of this action.

Adams, J. To briefly summarize, then, the established facts of this case, it appears that the plaintiff is the owner of valuable trade secrets, which were either discovered by one or more of the defendants or necessarily disclosed to them while occupying a confidential relation toward the plaintiff: that as to such trade secrets as were discovered by either Reichenbach or Passavant, they have undertaken and agreed to give the plaintiff the exclusive property in and control over the same, and that, in violation of this agreement, they are now proposing to make use of them, or some of them, in such a manner as to injure materially the plaintiff's business.

With these facts established, the application of the legal principles which must govern the disposition of the case does not appear to be a very formidable undertaking. It may be safely assumed at the outset, I think, that whatever remedy plaintiff may have does not reside in a court of law. The very nature of the case, the peculiar character of the injury liable to be inflicted, and the incalculable damages which may possibly result, all show most conclusively that legal relief is totally inadequate for plaintiff's protection, and that its only resort must be to a court of equity. The learned counsel for defendants has contended with all the adroitness and skill at his command that this case is not one of which a court of equity can take jurisdiction, and several authorities, of both English and American courts, are cited in support of this claim. I am constrained, however, to hold that the weight of authority is opposed to his view of the law. The question

presented is an interesting one, and would justify a somewhat analytical review of the cases which bear upon either aspect of it, did time permit, but for the purposes of this adjudication it will be necessary to advert to such only as are deemed conclusive upon this court.

In *Morrison* v. *Moat* (9 Hare, 241), which is an English case, it was held that an injunction would issue to restrain the use of a secret in compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a party who acquired knowledge of the secret in violation of the *contract* of the party by whom it was communicated and *in breach of trust and confidence.* An appeal was taken from the decision of the vice-chancellor and the case was affirmed by the Court of Chancery, and it was there held that "there is no doubt whatever that where a party who has a secret in trade employs persons under contract, either express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer." (*Morrison* v. *Moat*, 21 L. J. [N. S.] Eq. 248.)

In 1868 the Supreme Court of Massachusetts recognized and followed the authority of *Morrison* v. *Moat*, and in the opinion of Gray, J., the law is thus stated:

> If a party invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has not, indeed, an exclusive right to it as against the public, or against those who in good faith acquire a knowledge of it, but he has property in it which a Court of Chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority. [*Peabody* v. *Norfolk*, 98 Mass. 452.]

The same doctrine has obtained in this state for at least half a century, and it has been enunciated by a line of decisions which, with a single exception, is unbroken. (*Jarvis* v. *Peck*, 10 Paige, 118; *Hammer* v. *Barnes*, 26 Howard, 174; *Champlin* v. *Stoddart*, 30 Hun, 300; *Tabor* v. *Hoffman*, 118 N. Y. 30.) The Champlin case was decided by the General Term of this Department, Smith, P. J., writing the opinion, in the course of which he takes occasion to say that "a secret of trade is fully recognized in equity as property, the disclosure of which will be restrained by injunction." By a careful reading of the various decisions upon this subject, it will be seen that some are

made to depend upon a breach of an express contract between the parties, while others proceed upon the theory that where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employee will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets thus acquired is a breach of trust and a violation of good morals, to prevent which a court of equity should intervene.

It may also be observed in this connection that the word "property," as applied to trade secrets and inventions, has its limitation, for it is undoubtedly true that when an article manufactured by some secret process, which is not the subject of a patent, is thrown upon the market, the whole world is at liberty to discover, if it can, by any fair means, what that process is, and, when discovery is thus made, to employ it in the manufacture of similar articles. In such case the inventor's or manufacturer's property in his process is gone, but the authorities all hold that, while knowledge obtained in this manner is perfectly legitimate, that which is obtained by any breach of confidence cannot be sanctioned; and this distinction is quite forcibly presented in a recent decision of the Court of Appeals, to which the attention of this court has been directed by the supplemental brief of defendants. JUDGE LANDON, in his opinion, speaking of the plaintiff's claim, says: "His case is unlike those in which the injunctive process of the court is sought to restrain the disclosure of a secret, or the publication of a letter, which may prove injurious to business or character." (*Bristol* v. *Equitable Life Assurance Society*, 132 N.Y. 264.)

But, without multiplying citations or prolonging consideration of the legal aspect of this case, it may be said by way of conclusion that the principle contended for by the plaintiff is not only abundantly supported by authority, but is likewise founded on good common sense, and is peculiarly applicable to the case in hand. Here is a party which, by the expenditure of vast sums of money and the exercise of much skill and ingenuity, has built up a large and prosperous business, the capital of which consists largely in certain inventions and discoveries made by its officers, servants, and agents. The world at large knows nothing of these inventions and discoveries, but defendants, who have been largely instrumental in perfecting them, while under an express and implied contract to give the plaintiff the benefit of their inventive genius, propose now to disregard their

legal and moral obligations by creating a new establishment where these inventions and discoveries may be employed to the plaintiff's serious injury. This is not legitimate competition, which it is always the policy of the law to foster and encourage, but it is *contra bonos mores*, and constitutes a breach of trust which a court of law—and much more a court of equity—should not tolerate. It follows, therefore, that the plaintiff is entitled to the relief sought by this action, certainly as against the defendants Reichenbach and Passavant; and, as the defendant Milburn has allowed himself to engage in an illegitimate enterprise, with knowledge of or the means of knowing what its operation involves, I can see no good reason why he should not be subjected to the same restraining process as his co-defendants. Judgment is accordingly directed against all three defendants, with costs of the action.

QUESTIONS

1. What relief did the plaintiff ask for and obtain? Why does the court say that the plaintiff's relief at law would have been inadequate? What would have been his relief at law?
2. What would have been the decision in this case, had the defendants not been under a contract with the plaintiff to hold the trade information confidential?
3. Suppose that the plaintiff had not informed the defendants that the processes and formulas were to be held confidential, what would have been the decision of the court?
4. P had manufactured and sold a summer drink according to a secret process which he had originated. D analyzed the drink and discovered its ingredients. He thereupon began to manufacture and sell the same drink but under a different name. What are the rights, if any, of P against D?
5. X is under a contract with P to hold confidential certain trade information. X sells the information to D, who accepts and pays for it in good faith. What are the rights of P against D?
6. D, while employed by P in the manufacture of canned fruit, discovered a process by which a better quality of fruit at a lower price could be manufactured. D immediately left P's employ and began to manufacture the same kind of fruit according to the process which he had discovered. P asks that D be enjoined and that he be compelled to account for all profits which he had made. What decision?
7. It is said that a trade secret is property. Can it be sold? What becomes of it upon the death of its owner? What becomes of it upon the dissolution of a partnership which owns it?

8. Suppose that the defendants had for six months engaged in the sale and manufacture of photographic supplies, would the plaintiff have been entitled to any relief other than the injunction?

PEERLESS PATTERN COMPANY *v.* PICTORIAL REVIEW COMPANY

132 New York Supplement Reports 37 (1911)

Action by the Peerless Pattern Company against the Pictorial Review Company and another. From an order granting an injunction *pendente lite* and an order denying a motion to resettle such order, defendant named appeals. Order granting injunction reversed, and appeal from an order denying a motion to resettle dismissed.

Scott, J. This is an appeal from an order granting an injunction *pendente lite* restraining the defendant from interfering with plaintiff's business. The plaintiff and the defendant, the Pictorial Review Company, are both engaged in the business of selling paper patterns. The rivalry between them is evidently very keen, and the business seems to be conducted by both upon substantially the same lines. The method is to employ travelers who solicit contracts from storekeepers throughout the country. Plaintiff's contracts provide for the periodical shipment of patterns at an agreed price, with appropriate provisions for the return and replacement of those which the merchant has been unable to sell. The contracts are made for fixed periods, with the privilege to either party to cancel on 30 days' notice. Plaintiff keeps a card catalogue of the parties with whom it has contracts, together with certain particulars concerning the content of each contract.

Prior to March, 1911, defendant Dunigan was in plaintiff's employ as sales manager, and in this capacity naturally acquired knowledge of plaintiff's business, including the matters shown by the aforesaid card catalogue. There is a dispute as to whether or not this card catalogue was kept as a secret and confidential record. Plaintiff avers that it was. Dunigan says that it was not, but was always open to the clerks and employees. In March, 1922, Dunigan left plaintiff's employ and entered the employ of the defendant Pictorial Review Company, by whom he was employed as a traveler. It does not appear that said Review Company did anything to induce Dunigan to leave plaintiff's employ, but as soon as he had entered into the employ of the Review Company a vigorous effort was made to divert plaintiff's trade to defendant. One of the means used to this end

was an attempt to induce those with whom the plaintiff had contracts to break or cancel such contracts. In pursuance of this attempt there was sent to a number of plaintiff's customers a letter, signed by Dunigan, but in the name of the defendant Review Company and upon its letterhead, advising those to whom it was addressed at once to cancel the contracts with plaintiff and to enter into a contract with the defendant Review Company. These letters evidenced a knowledge of the contracts with plaintiff which could only have been obtained by Dunigan while in plaintiff's employ. It is also in evidence, but denied by Dunigan, that in his efforts to induce plaintiff's customers to break their contracts he made unfounded statements respecting the impending insolvency of plaintiff, and offered to defend the customer in any action that plaintiff might bring.

The first clause of the order appealed from restrains the defendant, and their officers, agents, and employes, "from interfering with the trade, custom, and good-will of the plaintiff's business, and from making use of the knowledge or information gained from or contained in plaintiff's original compilation or collection of names and addresses of the merchants with whom plaintiff has contracts for the sale and distribution of the patterns and publications manufactured and sold by plaintiff." We do not think that the case made by the motion papers is sufficiently strong to warrant an injunction *pendente lite* to the extent quoted above. What the evidence on the trial may develop we cannot say. But as the matter comes before us it does not clearly appear that defendants are making use of information acquired by Dunigan in confidence while in plaintiff's employ. All that clearly appears is that he undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful; for equity has no power to compel a man who changes employers to wipe clean the slate of his memory.

It follows that the order appealed from, granting the injunction, must be reversed and the motion denied and the appeal from the order denying the motion to resettle dismissed.

QUESTIONS

1. What would have been the decision in this case, if the information in the card catalogue had clearly been confidential?
2. Suppose that Dunigan, upon entering plaintiff's employ, had agreed for a consideration that he would hold confidential all trade information

he acquired while in the plaintiff's employ, what would have been the decision of the court?

3. Suppose that Dunigan had made a copy of the plaintiff's trade list, and had used it in his effort to divert the plaintiff's trade to the defendant Review Company, what would have been the decision of the court?
4. D was employed by P, an optician, to examine eyes of patients, to prescribe glasses, and to keep records of all examinations and prescriptions. D left P's employ and began an optical business of his own. In his business, he made use of a copy of P's records in soliciting P's customers. What are the rights of P, if any, against D?
5. D was employed by P to sell and deliver groceries and to solicit orders for groceries. P furnished D with a list of some 400 customers in a certain territory. In the course of his employment, D added some 50 or 75 names to this list. D left P's employ and entered the employ of X, engaged in the same business. D was immediately placed on the same route which he formerly covered for P, delivering and selling groceries and soliciting orders for X. D did not make use of P's trade list as such but did make use of one substantially the same, which he reproduced from memory. What are the rights of P against D and X?
6. D had formerly been employed by P, a wholesale dealer in butter and eggs, to solicit the trade of about one hundred well-known retailers in a certain town. He left the employ of P and entered the employ of X, a rival of P, and began soliciting the trade of the same retailers for X. P asks that D be enjoined from continuing such activities on behalf of X. What decision?

e) *Appropriation of Values Created by a Competitor*

I. INFRINGEMENT OF TRADE NAMES AND TRADE DEVICES

MERRIAM COMPANY *v.* SAALFIELD

198 Federal Reporter 369 (1912)

DENISON, Cir. J. The interpretative conflicts which have arisen seem to make it advisable to ascertain, somewhat more completely than those courts thought their statement necessary, the principles which underlie those decisions. A trade-mark is a trade-mark because it is indicative of the origin of the goods. The original right to its exclusive use was not based upon any statute, but upon principles of equity; and the right is acquired, not by discovery or invention or registration, but by adoption and use. The entire substantive law of trade-marks (excepting statutory provisions and construction) is a branch of the broader law of unfair competition. The ultimate offense always is that defendant has passed off his

goods as and for those of the complainant. *Capewell Horse Nail Company* v. *Mooney*, 172 Fed. 826, 97 C.C.A. 248; *Elgin National Watch Company* v. *Illinois Watch Company*, 179 U.S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365. More or less confusion has arisen because it happened that the specific offense and the specific rule were recognized and a body of law grew up concerning the same before the broader and inclusive offense was recognized and defined; but this does not prevent proper classification after both are understood.

Primarily, it would seem that one might appropriate to himself for his goods any word or phrase that he chose; but this is not so, because the broader public right prevails, and one may not appropriate to his own exclusive use a word which already belongs to the public and so may be used by anyone of the public. Hence comes the rule, first formulated in trade-mark cases, that there can be no exclusive appropriation of geographical words or words of quality. This is because such words are or may be, aptly descriptive, and one may properly use for his own product any descriptive words because such words are of public or common right. It soon developed that this latter rule, literally applied in all cases, would encourage commercial fraud, and that such universal application could not be tolerated by courts of equity; hence came the "secondary meaning" theory. There is nothing abstruse or complicated about this theory, however difficult its application may sometimes be. It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product, in other words, had come to be to them his trade-mark. So it was said that the word had come to have a secondary meaning, although this phrase, "secondary meaning" seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning. Here, then, is presented a conflict of right. The alleged trespassing defendant has the right to use the word, because in its primary sense or original sense the word is descriptive; but, owing to the fact that the word has come to mean, to a part of the public, something else, it follows that when the defendant

approaches the same part of the public with the bare word, and with nothing else, applied to his goods, he deceives that part of the public, and hence he is required to accompany his use of the bare word with sufficient distinguishing marks normally to prevent the otherwise normally resulting fraud.

The fact that a defendant is required to take this precaution demonstrates that in a very true sense his use of the word has become the secondary one; otherwise he need not carry the burden. In this particular field, the word naturally indicates the product of the complainant, and hence defendant must do something to remove the natural impression. This view may be illustrated by reference to the Singer Case. *Singer Manufacturing Company* v. *June Manufacturing Company*, 163 U.S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. It was established as a fact that to those buying and using sewing machines the word "Singer" had come to import that the machine on which it was used was made by the Singer Company; in other words, when that part of the public saw a sewing machine marked "Singer," its first and natural thought was that the machine was made by the Singer Company. If one who saw a sewing machine marked "Singer" would primarily and naturally accept the words as referring only to the mechanical construction of the machine according to the Singer patents, then the June Company committed no fraud by using the word without explanation, and the burden would have been upon the Singer Company further and particularly to identify its goods; but this was not the result. The whole burden was put upon the June Company.

QUESTIONS

1. "All words of the language are public property. Like highways, they are part of the public domain." Explain what is meant by this statement.
2. If the foregoing statement is true, upon what theory do courts protect the use of certain words as trade-marks?
3. What is meant by the protection of trade names under the doctrine of *secondary meaning?*
4. How is this secondary meaning acquired? How extensive is the protection granted such trade names?
5. The court said in this case: "The entire substantive law of trademarks [excepting statutory provisions and construction] is a branch of the broader law of unfair competition." What does the court mean by this statement?
6. How does a trade name differ from a trade-mark?

RUBBER HARNESS TRIMMING COMPANY *v.* DEVOE & REYNOLDS COMPANY

233 Federal Reporter 150 (1916)

Suit in equity by the Rubber & Celluloid Harness Trimming Company against the Devoe & Reynolds Company. Decree for complainant.

HAIGHT, D. J. The defendant contends that the word "Rubberset" is not a valid trade-mark, because it is merely descriptive of the process of manufacture, of the characteristics, qualities, or ingredients of the brush, and consequently that there can be no infringement of it, and that it has been guilty of no unfair competition, because it has not only not used the word "Rubberset," but has accompanied the words, "Set in Rubber," whenever used, with its own name, which it claims clearly indicates that the brushes are not manufactured by the plaintiff and thus has done all that the rules of law require that it should do. It is not claimed by plaintiff, either in its pleadings or in the arguments of counsel, that there is a technical infringement of a valid trade-mark; but it is insisted that under the facts in this case either the use of the words "Set in Rubber," alone, or in the way in which the defendant uses them, constitutes unfair competition, as the latter phrase is now understood in the law.

I think it entirely clear that "Rubberset" is not a valid trade-mark as applied to brushes made according to the Read process, because it does not in itself indicate the origin of manufacture, but is merely descriptive of the process of manufacture—the essential characteristic of the brush—the same as "glue set," "cement set," etc. These latter terms, the evidence shows, had been used by manufacturers to describe the manner in which their brushes were made, long before the plaintiff began to use "Rubberset." The general proposition upon which the foregoing conclusion rests is, of course, so well settled as to need no citation of authorities. The decisions of the New Jersey courts in the *Rubber-Bound Company Case,* 81 N.J. Eq. 419, affirmed in 81 N.J. Eq. 519, were based on unfair competition, and it seems to have been assumed that the plaintiff's trade-marks were invalid as such.

But, as plaintiff contends, it is also well settled that words which are not in themselves a valid trade-mark may, by association with the goods of a particular manufacturer, acquire a secondary signification differing from their primary meaning and denoting the product of

that manufacturer, and when this is made to appear, their use in that sense will be protected by restraining the use of the words by others in such a way as to amount to a fraud or deception on the public and to cause injury to those to whose employment of them a special meaning has become attached, upon the principles which underlie the law pertaining to trade-marks, that the manufacturer of the particular goods is entitled to good-will which they have acquired, and the public is entitled to the means of distinguishing between them and other goods, or, in other words, to state it concisely, that no one may pass off his goods as and for the goods of another. *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Company*, 138 U.S. 537; *Coats* v. *Merrick Thread Company*, 149 U.S. 562; *Singer Manufacturing Company* v. *June Manufacturing Company*, 163 U.S. 169; *Elgin National Watch Company* v. *Illinois Watch Company*, 179 U.S. 665; *Reddaway* v. *Banham*, 1896 A.C. 199.

The first question to be decided is, therefore, whether the word "Rubberset" has acquired a secondary signification or meaning of origin of manufacture, in other words, whether it has come to mean to the public brushes manufactured by the plaintiff. This is a question of fact. It was found by Vice-Chancellor Howell in the *Rubber-Bound Company Case*, and his finding was unanimously concurred in by the Court of Errors and Appeals of New Jersey, that it had acquired such a meaning; and while I have not had the benefit of an examination of the evidence which was before him, I think I am safe in assuming that it was of no more probative force than that which was offered in this case. Without attempting to review the evidence (which I think would serve no useful purpose) I unhesitatingly concur in his finding, and conclude, on the facts in this case, that it has acquired such a secondary meaning, not only among manufacturers, but among dealers and the general public. The evidence furnishes many instances to support this conclusion, which, of necessity, are isolated, but nevertheless, I think, representative. In fact, knowing as we do the effect of modern advertising, it would be difficult indeed, when the character and extent of the advertising which the plaintiff has carried on is considered, to escape the conclusion that the word "Rubberset," as applied to brushes, has come to mean brushes manufactured by the plaintiff.

It has been uniformly held in the various circuits that it is not necessary that actual intent to deceive be shown. *Van Houten* v. *Hooton Cocoa Company*, 130 Fed. 600; *Samson Cordage Work Com-*

pany v. *Puritan Cordage Mills*, 211 Fed. 603. The rule, as I understand it, is that if one uses a word or words which have acquired the secondary meaning before mentioned, in such a way as would be likely to deceive the public in believing that his goods are those of another, that it will be conclusively presumed that he intended to deceive and injure. If the presumption were rebuttable, and made to depend upon the actual intent of a party, in many cases the courts would be powerless to prevent deception, and to afford a remedy for what, in reality, would be a wrong. In applying the rule it is to be borne in mind that the likelihood of deception is not confined to the dealer (who would likely be able to distinguish); but the rule primarily seeks to protect the ordinary purchaser, or, in other words, the liability of the ultimate consumer to be misled must be reckoned with. *Coca-Cola Company* v. *Gay-Ola Company*, 200 Fed. 720. Indeed the rule would be of little practical use if it could be avoided by showing that dealers would not be deceived; for then the dealer could unrestrainedly perpetrate deception upon the ultimate consumer. So the courts have wisely required that the manufacturer must, in the first instance, take such precautions as will make it fairly impossible for a dealer to deceive an ordinarily cautious customer.

It remains to consider the facts of this case in the light of these rules. In doing so it must be remembered that the plaintiff has now no exclusive right to use the Read process, or to the reputation for the superiority of the products of that process, whether the same has been acquired by its advertising or not. But it has the exclusive right to the reputation which it has acquired for the brushes manufactured by it according to the process. The defendant, as well as others, has the right to describe and advertise its brushes as made according to the rubber set process. The question, then, is: Has it done so in such a way as to mislead the public? In its catalogue it designates its brushes, which are made according to this process, as "Set in Rubber." It seems to me ridiculous to say that a description in a catalogue, prepared and distributed by the defendant, of goods as "Set in Rubber," would induce anyone who saw that catalogue to believe that the goods therein described were manufactured by the plaintiff, because the catalogue shows, as clearly as it is possible to show anything, that the goods are manufactured by the defendant. To say that a name has acquired a secondary meaning, denoting the origin of manufacture, and at the same time to say that the use of those words in a catalogue of goods of another manufacture, would

lead a person reading that catalogue to believe that the goods were manufactured by the first manufacturer, presents a contradiction which must destroy any secondary meaning of the word, because it would show that the secondary meaning was not of origin, but of process of manufacture. See Remarks of CHIEF JUSTICE WHITE in the *Singer Case*, 163 U.S. 200. The same would seem to apply in respect to billheads, letters, circulars, and advertisements other than display matter, where the full name of the manufacturer is given equal prominence with that of the descriptive words "Set in Rubber." But, when the marking on the brushes is considered, I think quite a different situation is presented. The words "Set in Rubber" are so similar to the word "Rubberset" that, when the former are found by an intending purchaser in the same place and in the same kind of characters on a brush as the latter word, as in this case, the natural result would be extreme liability of deception. The public, through the plaintiff's advertisements of various kinds, has become accustomed to seeing the word "Rubberset" embossed on the ferrule of the brushes advertised as manufactured by the plaintiff. The plaintiff was the first in the field to mark them. It follows, therefore, that the embossing by the defendant on the ferrule of its brushes of the words "Set in Rubber" is such as would inevitably lead to deception, as the evidence demonstrates that it has, and hence constitutes unfair competition. The words are thus not used descriptively, but as a trade name.

But it is insisted that, even if this is so, the use of the word "Devoe" on the ferrule of the brushes, in connection with the words "Set in Rubber," together with the marking of the name of the manufacturer on the handle, will prevent misapprehension upon the question of origin. This depends, to some extent, upon the meaning which the word "Devoe" has acquired in the public mind. Although the defendant has long been engaged in the manufacture of brushes, still the evidence shows, I think, that its reputation, so far as the public is concerned, is that of a manufacturer of paints. In addition the word "Devoe" might convey to the ordinary purchaser merely the name of a brand. I think the evidence demonstrates, as well as the probabilities based on common experience, that the word "Devoe," used as it is in connection with the words "Set in Rubber," would not sufficiently prevent misapprehension as to the origin of manufacture on the part of one who wished to buy a "Rubberset"

brush manufactured by the plaintiff, and whose inclination to do so was brought about by the plaintiff's advertising. What has just been said applies to display matters furnished by the defendant and used in stores where its brushes are sold. A sign, such as was offered in evidence and therein referred to as the "White Sign," which has on it only this, "Something New in Devoe Quality—Set in Rubber," and the picture of a brush with the words "Set in Rubber—Devoe" on the ferrule, would be quite as likely to deceive an intending purchaser as the words "Set in Rubber—Devoe" embossed on a brush.

The remaining question is, therefore, what specific relief the plaintiff is entitled to—relief which will protect it from injury, and at the same time preserve the rights of the defendant. To preclude the use altogether of the words "Set in Rubber," because of their resemblance to the word "Rubberset," would be to give to the latter the full effect of a trade-mark, while denying its validity as such. This, so far as the federal courts, at least, are concerned, cannot be done. *Herring-Hall-Marvin Safe Company* v. *Hall's Safe Company*, 208 U.S. 554; *Yale & Towne Manufacturing Company* v. *Ford*, 203 Federal 707. The rule which must govern the federal courts is that stated by CHIEF JUSTICE WHITE in the *Singer Case*, 163 U.S. 200, that the word or words "must be accompanied with such indications that the thing manufactured is the work of the one making it, as will *unmistakably inform the public of that fact.*" This does not mean, of course, that one may "dress up" his goods like another. In order "unmistakably to inform the public" as to the origin, similar "dressing up" of goods may be enjoined, where, if it were permitted, even though accompanied with the name of the manufacturer, it would be likely to deceive.

The plaintiff will therefore be awarded an injunction in accordance with the foregoing conclusions. It is also entitled to costs and damages. But under the rule enunciated by the circuit court of appeals of this circuit in *Sharpless Company* v. *Lawrence*, 213 Fed. 423, and which I think finds support in the recent opinion of the Supreme Court in *Hamilton Brown Shoe Company* v. *Wolf Bros. & Company*, 240 U.S. 251, I do not think it is entitled to an accounting for profits, because I cannot find that the unfair competition was so "wilful and fraudulent" as to justify the imposition of profits as a "punitive addition to the ordinary decree of compensatory damages."

QUESTIONS

1. Why was the word "Rubberset" not subject to appropriation as a trade-mark?
2. Suppose that it could have been shown in this case that no jobber or retailer would have been deceived by the defendant's trade name, would the court's decree have been the same?
3. What relief was granted to the plaintiff? Why was the defendant not enjoined absolutely from the use of the words "Set in Rubber" as a trade name?
4. Why did the court not compel the defendant to account to the plaintiff for all profits earned during the period of infringement?
5. Suppose that the defendants had used the words in question in ignorance of the use of "Rubberset" by the plaintiff, would the decision have been the same?
6. P manufactures and sells a kitchen utensil, partly composed of aluminum, under the name of "Aluminum." Later, D begins to manufacture and sell a kitchen utensil under the same name. To what relief, if any, is P entitled?
7. P manufactures and puts on the market a chewing gum under the name of "Spearmint." D later begins to sell a gum under the same name. To what relief, if any, is P entitled?
8. P places on the market a whiskey under the name "Honeymoon Whiskey." Later, D begins to market a whiskey under the name "Honeycomb Whiskey." To what relief, if any, is P entitled?
9. P places on the market a washing powder under the name of "Gold Dust." D later begins to sell a washing powder which he calls "Gold Drop." To what relief, if any, is P entitled?

INTERNATIONAL SILVER COMPANY *v.* ROGERS

72 New Jersey Equity Reports 933 (1907)

Trenchard, J. This suit is a continuation of the litigation heretofore carried on by the International Silver Company against the William H. Rogers Corporation, and reported in 66 N.J. Eq. 119, and on appeal in 67 N.J. Eq. 646.

The decree in that case was directed against the William H. Rogers Corporation, and its officers and directors, and enjoined them from making and selling silver-plated flat ware under the name of "Wm. H. Rogers," or under any name of which the word "Rogers" is a part.

This suit has to do with occurrences since the rendition of that decree. After that decree, and on or about April 6, 1905, the William

H. Rogers Corporation changed its name to "Plainfield Silver Plate Company," and continued to carry on the business under its new name until May 25, 1905, when it went out of business. The defendant (W. H. Rogers), who was in control of the stock of the company, and was its president, purchased from it all its unplated blanks, its machinery, tools, and fixtures of every kind, its lease on its office and factory, and proceeded to carry on the same business in which it had embarked, under his own name of W. H. Rogers. He now stamps his manufactured goods (his knives, forks, and spoons) with the words "W. H. Rogers of Plainfield, N.J.," and marks his packages "Not connected with any other Rogers."

Upon this state of facts the complainant filed its bill of complaint, in the nature of a supplemental bill, against the defendant for an injunction, and the case came on before the vice-chancellor on the bill, answer and proofs taken in the cause and the record and testimony of the former case. The vice-chancellor dismissed the bill.

In its bill the complainant claims that the stamp which the defendant puts on his product, namely, the words "W. H. Rogers of Plainfield, N.J.," tends to produce confusion in the trade to the injury of complainant's business, and to the wrong of the public, and the complainant asks that he be enjoined from the further prosecution of his business, unless he stamps his product in such a way as to make it plain that it is not manufactured by the original William Rogers Company, to whose business the complainant was the successor.

The learned vice-chancellor thought the injunction should not go, holding that the defendant was under no obligation to do anything more than use his own name fairly; that the evidence showed no fraud, and that the mere fact that a competitor is, or may be, injured, is not material.

In that view we cannot concur. Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the articles produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Singer Manufacturing Company* v. *June Manufacturing Company*, 163 U.S. 169; *Russia Cement Company* v. *Le Page*, 147 Mass. 206;

Pillsbury v. *Pillsbury*, 24 U.S. App. 395; *Croft* v. *Day*, 7 Beav. 84; *Holloway* v. *Holloway*, 13 Beav. 209; *Wotherspoon* v. *Currie*, L.R. 5 H. L. 508; *Howard* v. *Henriques*, 3 Sandf. 725; *Meneely* v. *Meneely*, 62 N.Y. 427; *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Company*, 138 U.S. 537; *Brown Chemical Company* v. *Meyer*, 139 U.S. 540; *Coats* v. *Merrick Thread Company*, 149 U.S. 562.

The leading case is *Singer Manufacturing Company* v. *June Manufacturing Company*, *supra*, in which Justice White, after affirming the doctrine set forth above and citing the cases which support it, declared: "Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications."

When this suit was originally before the court the vice-chancellor found that the name "Rogers" had acquired a secondary significance in connection with the manufacture of silverware. In his opinion, reported in 66 N.J. Eq. (21 Dick.) 120, he uses this language:

> The complainant is the successor of several companies which have been engaged for many years in the manufacture of silver-plate ware, and which all derive their title from three brothers of the name of Rogers, who were among the first, if not the first, to apply the art of electroplating to its manufacture. They gained a reputation for their products, and the name "Rogers" has acquired a secondary significance in connection therewith.

That finding of fact is, in our judgment, fully warranted by the evidence. While a personal name may not constitute a technical trade-mark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact. *Williams* v. *Mitchell*, 106 Fed. Rep. 169; *Meyer* v. *Medicine Company*, 58 Fed. Rep. 884; *Baker* v. *Saunders*, 80 Fed. Rep. 889; *Allegretti* v. *Allegretti*, 52 N.E. Rep. 487; *Pillsbury* v. *Mills Company*, 64 Fed. Rep. 841; *Allegretti* v. *Keller*, 85 Fed. Rep. 643; *Raymond* v. *Powder Company*, 85 Fed. Rep. 231; *Mills Company* v. *Eagle*, 86 Fed. Rep. 608.

The normal presumption that the use of one's own name is an honest one may be rebutted by showing a prior fraudulent use of it touching the matter in issue. Such prior fraudulent use of the defendant's name in connection with the manufacture and sale of silverware is established in this case by the testimony herein and the record of the original suit. The burden is therefore on the defendant to show that the use of his name is not in effect a continuation of such prior fraud. The defendant has not only failed to sustain this burden, but, on the contrary, the testimony in the present case abundantly shows that the defendant has acquired by purchase and is enjoying the results of a business which was built up in fraud of the complainant; it had been established by the corporation which bore his name, and a certain part of its success, at least, was due to the fact that it was getting the benefit of the reputation achieved by the original Rogers people, to the good-will of whose business the complainant had succeeded. That benefit he must continue to receive while carrying on this same business in his own name, unless the public are enabled to certainly know that the goods which he puts upon the market are not the goods of the complainant or its predecessors.

The defendant contends that he distinguished his goods by stamping on them the words, "W. H. Rogers of Plainfield, N.J." The alleged distinguishing words are "of Plainfield, N.J." But that is not a distinguishing mark. As the history of the "Rogers" name in connection with silver-plated ware shows, there were several places where the art was carried on and the "Rogers" mark was lawfully used. Locality has no sufficiently distinguishing force, because locality is not associated in any way with the mark itself. It is the word "Rogers" that is all controlling, and it is that which should be differentiated in order to effectually distinguish the goods.

In *Baker* v. *Sanders*, 80 Fed. Redp. 889, 895, the defendant (in lieu of more extended changes) was required to affix the statement that "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company."

In the case of *Allegretti* v. *Allegretti, supra,* in the supreme court of Illinois, the court enjoined the defendants against the use of the name "Allegretti" except in a manner indicating that the defendant's goods are "Manufactured and sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company."

In cases like the present one, it is elementary that the person to be considered is not the jobber or wholesaler, but the ordinary purchaser

at retail. This being so, the marks "Not connected with any other Rogers" which are put upon the boxes, packages, and wrappers, and which do not reach the purchaser at the retail shops, afford no means to the retail purchaser of distinguishing the defendant's product from that of the complainant. Under the circumstances of the present case it was the duty of the defendant to so distinguish the silverware made by him that it could not be mistaken for the silverware known to the world as the "Rogers" ware.

The words, "Not connected with any other Rogers," even if they reached the retail purchaser, would not suffice for that purpose. Those words merely tend to add to the confusion. They might well be, and usually would be, employed by an original manufacturer seeking to warn the trade when he finds on the market other goods which may be passed off as his. They would be the appropriate announcement of an original maker that he has no connection with other wares of similar appearance of wares put out under a similar name. These words also afford an unscrupulous retail dealer opportunity to pass off the product as the original "Rogers" goods. In employing such words, so misleading and ambiguous, the defendant is clearly guilty of bad faith.

The defendant having failed in the performance of his duty so to distinguish his silverware that it could not be mistaken for that of the complainant, we think the complainant is entitled to have an injunction restraining the defendant from manufacturing and selling his goods unless he stamps upon them the words, "Not the original Rogers" or "Not connected with the original Rogers." As was said in *Allegretti* v. *Kellar*, *supra*, this "saves the complainant's rights and works no hardship to an honest defendant."

The decree must therefore be reversed and the record remitted to the court of chancery in order that a decree may be made in accordance with this opinion. The complainant is entitled to costs in the court of chancery and in this court.

QUESTIONS

1. Where did the complainant, The International Silver Company, get the right to use the word "Rogers" in connection with its business?
2. Is the court holding in this case that W. H. Rogers cannot use his own name in connection with the silverware business? If not, what is the court holding?
3. Why was the complainant not entitled to protection of the name "Rogers" as a trade-mark?

4. Simeon L. and George H. Rogers, sons of one of the original Rogers, went into the silverware business and advertised their goods as the "Real Rogers Goods." To what relief, if any, is the successor of the original Rogers entitled?
5. In the foregoing case, the Rogers brothers advertise that they are in no way connected with the business of the original Rogers; they publish on all boxes and state in all catalogues and announcements the same facts; but on individual pieces of silver they place the words "Manufactured by Rogers Bros." To what relief, if any, is the successor of the original Rogers entitled?
6. P and his predecessors in business have since 1823 manufactured and sold pianos. Since 1844 these pianos have been marketed under the name of "Chickering," which word appears on the fall board of each instrument, after Jonas Chickering, the founder of the business. In 1898, B and D, grandsons of Jonas Chickering, organized a corporation, "Chickering Bros.," for the purpose of manufacturing and selling pianos. They marked their pianos on the fall board of each instrument "Chickering Bros." They advertised truthfully that they were the sole living survivors of the founder of Chickering pianos engaged in the piano business; that they had had experience in the factory of the original Chickering; and that their instrument was the only piano now manufactured by a Chickering. To what relief, if any, is the complainant entitled?
7. In cases of the kind herein involved the courts have attempted to strike a compromise between the conflicting interests of the parties by requiring the junior user of the name to accompany it with an explanatory phrase to prevent confusion and fraud. What are the weaknesses of this attempt?
8. P owned an old and well-known business under the name of J. B. Williams Soap Company, manufacturing and selling "Williams Soap." Certain persons bearing the name of Williams started a competing business. They later incorporated as the Williams Soap Company and sold out their interest in the business to D and others. P now asks that the Williams Soap Company be enjoined from the use of "Williams" as a part of its corporate name. What decision?

AMERICAN WALTHAM WATCH COMPANY *v.* UNITED STATES WATCH COMPANY

173 Massachusetts Reports 85 (1899)

Bill in Equity, filed October 15, 1890, and amended September 22, 1898, to restrain the use of the word "Waltham" on watches made by the defendant, to the detriment of the plaintiff's business as a

manufacturer of watches in Waltham. Hearing before Knowlton, J., who, with the consent of the parties, reported the case for the consideration of the full court. The facts appear in the opinion.

Holmes, J. This is a bill brought to enjoin the defendant from advertising its watches as the "Waltham Watch" or "Waltham Watches," and from marking its watches in such a way that the word "Waltham" is conspicuous. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business. It was found at the hearing that the word "Waltham," which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name. This is recognized by the defendant so far that it agrees that the preliminary injunction, granted in 1890, against using the combined words "Waltham Watch" or "Waltham Watches" in advertising its watches, shall stand and shall be embodied in the final decree.

The question raised at the hearing, and now before us, is whether the defendant shall be enjoined further against using the word "Waltham," or "Waltham, Mass.," upon the plates of its watches without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff. The judge who heard the case found that it is of considerable commercial importance to indicate where the defendant's business of manufacturing is carried on, as it is custom of watch manufacturers so to mark their watches, but nevertheless found that such an injunction ought to issue. He also found that the use of the word "Waltham," in its geographical sense, upon the dial, is not important, and should be enjoined.

The defendant's position is that, whatever its intent and whatever the effect in diverting a part of the plaintiff's business, it has a right to put its name and address upon its watches; that to require it to add words which will distinguish its watches from the plaintiff's in the mind of the general public is to require it to discredit them in advance; and that, if the plaintiff by its method of advertisement has associated the fame of its merits with the city where it makes its ware instead of with its own name, that is the plaintiff's folly, and cannot give it a monopoly of a geographical name, or entitle it to increase the defendant's burdens in advertising the place of its works.

Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff merely on the strength of having been the first in the field may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.

We cannot go behind the finding that such a deceitful diversion is the effect and intended effect of the marks in question. We cannot go behind the finding that it is practicable to distinguish the defendant's watches from those of the plaintiff, and that it ought to be done. The elements of the precise issue before us are the importance of indicating the place of manufacture and the discrediting effect of distinguishing words on the one side, and the importance of preventing the inferences which the public will draw from the defendant's plates as they are now, on the other. It is not possible to weigh them against each other by abstractions or general propositions. The question is specific and concrete. The judge who heard the evidence has answered it, and we cannot say that it is wrong.

Decree for the plaintiff.

QUESTIONS

1. Did the complainant have an exclusive right to use "Waltham" as a trade-mark? If not, upon what theory was he granted relief?
2. Suppose that the defendant had begun to manufacture watches in Waltham within six months after the complainant began, what would have been the rights of the plaintiff against the defendant, if any?
3. A great many flour manufacturers in Minneapolis manufacture "Minneapolis Flour," each marketing his product under its individual trade name or trade-mark. D secured an inferior grade of flour from a manufacturer in Milwaukee, branded it as "Superior Minneapolis Flour," and placed it on the market. Can D be prevented from doing this?
4. Suppose that the name "Minneapolis Flour" had come to mean a flour manufactured by a certain process, that D had manufactured flour by that process in Chicago and had placed it on the market as "Superior Minneapolis Flour," would this have been unfair to anyone? If so, to whom?
5. For many years P manufactured brick of a superior kind in Clay County, Alabama, and marketed them under the name of "Clay County Brick." He later moved his business into another county and continued to manufacture and sell brick under the same name. D then began the manufacture of brick in Clay County and sold them as "Clay County Brick." To what relief, if any, is P entitled?

6. Do you conclude from the decision in the principal case that the defendant is entirely precluded from the use of the word "Waltham" in connection with his business?

FORSTER MANUFACTURING COMPANY *v.* CUTTER-TOWER COMPANY

211 Massachusetts Reports 219 (1911)

Bill in equity, filed in the Supreme Judicial Court on June 20, 1910, to restrain the defendant from selling, offering or advertising for sale any toothpicks, not manufactured by the plaintiff, in packages like those of the plaintiff or in any packages so similar as to be likely to cause the defendant's goods to be mistaken for the plaintiff's goods, and to recover damages and the profits which had accrued to the defendant from its alleged unlawful acts.

The case came on to be heard before Morton, J., who reserved it upon the pleadings and the master's report for determination by the full court. If this court should determine that the plaintiff was entitled to the relief prayed for, the case was to stand for further hearing upon the question of damages and profits; otherwise, such decree was to be entered as to the court should seem meet.

Braley, J. The plaintiff corporation, as found by the master, began the manufacture and sale of toothpicks five years and more before the bill was filed, and during this period has established a valuable business. It adopted in the marketing of the product a box or package of distinctive size and shape bearing in colors a characteristic design so collocated as to make the combination dissimilar from any label, form of package, or dress of goods then in use by other manufacturers or dealers. During the development of its trade a certain proportion of the packages had the imprint of the name of various jobbers to whom the exclusive sale of the goods had been given, or of some fanciful word or phrase suggested by them, and the entire production became classified as either the factory brand sold generally to the jobbing trade under brand names used only by the plaintiff, or the jobber's brand. But while the color of the printing and of the background on the factory brand differed from the jobber's brand, the quality of the goods was uniform, and every package as it left the factory bore the monogram of the plaintiff, with a further distinguishing design of a wreath overlapped by a curved band with an escalloped gold edge. The plaintiff upon these findings, while

claiming no rights or property in the brand name, used by the jobber, had acquired a reputation and good-will in connection with, and as a part of, his business, which generally is recognized as a property right and will be protected against the unfair competition of rival manufacturers or dealers in similar products. *George C. Fox Company* v. *Glynn*, 191 Mass. 344, 349. *Reading Stove Works* v. *S. M. Howes Company*, 201 Mass. 437, 438. *Draper* v. *Skerrett*, 116 Fed. Rep. 206.

It is wholly immaterial, where this right has been invaded, that the retail or wholesale dealer who may be the immediate purchaser of goods put out in imitation is not misled as to their identity. The wrong of unfair competition is present where goods are so dressed in form, or marked by decorative symbols, that the ultimate consumer, when the goods are distributed for use in the ordinary course of trade, either is, or possibly may be, deceived. The liability to deception being the test, it also is not necessary to show that specific buyers have been actually deceived or that the infringer intended to deceive the public. He is bound to know the probable consequences, where the means of such deception have been supplied by him. *New England Awl & Needle Company* v. *Marlborough Awl & Needle Company*, 168 Mass. 154. *Reading Stove Works* v. *S. M. Howes Company*, 201 Mass. 437, 440, 441, and cases there cited.

The defendant, for the purpose of acquiring the extensive trade of a jobber with whom the plaintiff did business, deliberately duplicated the plaintiff's box or package in every particular with the exception of the monogram, and thereafter these receptacles filled with toothpicks in which the defendant, although not a manufacturer, very largely dealt, were widely distributed to consumers through dealers in the trade to whom it sold them. This misappropriation having been an invasion of the plaintiff's exclusive right to the form, style, and dress of the box or package in which its goods had been marketed, it is entitled to injunctive relief even if the defendant had acted innocently. But as the defendant must be presumed to have contemplated the probable effect of its purpose to acquire so far as possible the plaintiff's customers and trade, it is liable for both actual damages and profits, if any, realized from the sale of toothpicks in the imitation packages. *Regis* v. *Jaynes*, 191 Mass. 245. *Reading Stove Works* v. *S. M. Howes Company*, 201 Mass. 437, 441–43. By the terms of the reservation of the single justice, the case is to stand for further hearing upon these questions.

Decree accordingly.

QUESTIONS

1. Did the complainant have a proprietary right in the dress of his goods? Could he have registered the dress of his goods as a trade-mark? What was the theory upon which the court granted relief in this case?
2. Did it appear in this case that the defendant intended to infringe upon the reputation of the complainant's goods? Suppose that the defendant had acted in entire ignorance of complainant's goods and their dress, would the decision have been the same?
3. What relief was granted to the complainant? What is the measure of recovery in such a case? Does the innocence or guilt of the defendant have anything to do with the measure of recovery in such cases?
4. P puts a certain article on the market, dressed in a distinctive way, and begins to advertise it. D immediately places on the market an article of the same kind and dressed substantially like P's. He advertises his article much more extensively than P advertises his own. Consumers buy D's article in preference to P's because they know more of it through D's advertising campaign. To what relief, if any, is P entitled?
5. The P Company marketed a chewing tobacco on each plug of which there was a tin tag of rhomboid shape, having a dark background, with the word "Schnapps" printed thereon in red letters slanting backward. The D Company later began to sell chewing tobacco. Its plug was of the same size, style, and color as that of P, the only difference being that D used the word "Traveller" instead of "Schnapps" on his tag. To what relief, if any, is P entitled?
6. P has for many years been in the taxi business. His car is of a distinctive build and painted blue. D enters the same business and uses a car similarly constructed but painted a slightly different shade of blue. To what relief, if any, is P entitled?
7. What test or tests can be laid down for determining whether the dress of one person's goods so nearly resembles the dress of a competitor's goods that confusion and fraud are likely to result from the imitation?

YALE & TOWNE MANUFACTURING COMPANY *v.* ALDER

154 Federal Reporter 37 (1907)

Appeal from a decree of the Circuit Court of the United States for the Eastern District of New York, dismissing complaint in a suit for unfair competition, consisting of the imitation of a padlock manufactured by complainant and of its catalogue number. Decree reversed at the close of the argument.

Wallace, Cir. J. We are prepared to dispose of this appeal now. In cases like this, where unfair competition in trade is charged, based upon the manufacture and sale by the defendant of an article in simulation of one previously put upon the market by the plaintiff, when specimens of the article are before the court and there

is no question of their authenticity, the court can judge of the resemblance between them, and whether purchasers are likely to be deceived by the resemblance, and the testimony of experts or of dealers is of little assistance. A comparison of the exhibits satisfies us beyond any doubt that the defendant has so closely copied the plaintiff's padlock in form, size, coloring, lettering, and details of finish that his articles are likely to induce purchasers to buy his padlocks supposing them to be the padlocks of the plaintiff. Retail dealers and the trade generally will no doubt recognize differences, and are in no danger of being misled by any resemblance of identity between the articles, but the question is whether their customers, the ordinary purchasers who buy from the retail dealer are likely to be deceived; and that they are we are thoroughly convinced.

Many of the features of the plaintiff's padlock were separately a fair subject of appropriation by rival manufacturers, because they were not original with the plaintiff, but the plaintiff was the first to assemble them together in the concrete form in which its padlock has become known to the public as its product; and, while we cannot say that the appropriation by the defendant of this particular feature would have been unfair, we can say that when all of the prominent ones have been appropriated, and so assembled together with slight variations in some of them that altogether they produce the same general effect, and the ordinary purchaser would not be apt to discover the difference, enough appears to establish unfair competition. The defendant has with a purpose taken the design and dress of the plaintiff's padlock. He has carefully copied it, differentiating his own from it in minor details probably intending to escape the charge of infringement; but he has gone a step too far when he has produced a padlock which to casual observation is substantially identical in appearance with the plaintiff's. His apparent purpose was to extend his trade with retail dealers and supplant the plaintiff's sales to such dealers by furnishing them with an article which could be sold readily to customers as the article made by the plaintiff. When the defendant sold his locks to the retail dealers at a considerably less price per dozen than that which they were obliged to pay for the plaintiff's locks, he placed a strong temptation before those dealers to buy his locks and increase their profits by selling them to customers wanting to purchase the plaintiff's higher-priced locks; and we are constrained to believe it was intentionally and deliberately done in order to increase his trade at the expense of the plaintiff's.

The evidence in the record shows a laxity of business morality among lock manufacturers in appropriating the form, dress, and general appearance of each other's products which is not commendable, and which it is hoped does not exist in other trades; but this evidence and the argument based upon it cannot influence the court in a case where infringement is clear and the public are likely to be deceived, and they as well as the plaintiff are entitled to protection.

Decree reversed.

QUESTIONS

1. What was the nature of the relief asked for in the principal case? Did the plaintiff get the relief asked for? Is there any other form of relief he might have asked for and obtained?
2. Could the plaintiff have registered the form, size, and coloring of his padlock as a trade-mark? If not, why not?
3. Suppose that the defendant had not consciously imitated the plaintiff's article, but that the inevitable result of the resemblance of his article to that of the plaintiff enabled retailers to "palm off" the defendant's article for the plaintiff's, would the decision have been the same?
4. P made and sold bread in loaves of a peculiar size and shape. His bread had gained a wide and favorable reputation and was known by its visual appearance, due to its shape which was "uneconomical and less convenient and satisfactory for slicing than shapes usually adopted." D began to sell bread in loaves, substantially similar in size, shape, and visual appearance. What are the rights of P against D?
5. In the foregoing case, suppose that the size and shape were the most convenient in using the loaf, would your answer be the same?
6. P, a manufacturer, in order to give his nails a distinctive appearance, bronzed the heads. The bronzing did not add to the quality or usefulness of the nails. D, a rival manufacturer of nails, began to bronze his nails in the same way. To what relief, if any, is P entitled?
7. P for a number of years held a patent on castoria, a medicine. After his patent expired and after castoria as a preparation had become public property, he spent much money in advertising the medicine under the name of "Castoria." D later began to manufacture castoria and sell it under the same name. To what relief, if any, is P entitled?

ELGIN NATIONAL WATCH COMPANY *v.* LOVELAND

132 Federal Reporter 41 (1904)

Bill in equity to restrain unfair competition. Submitted on demurrer to the bill and motion of complainant for preliminary injunction.

Reed, D. J. Is complainant entitled to a preliminary injunction? The fraudulent practices of defendants, as alleged in the bill, are stated in substance above. That the exclusive use of a merely geographical name, or one descriptive only of an article of commerce, cannot be acquired, is clear. But when such a name has been so used in connection with a certain line of business as to indicate not only the place of manufacture or production, but the name of the manufacturer or producer, and the excellence of the thing made or produced, then it may have acquired such secondary signification or meaning as will enable the one who has so used the same to assert an exclusive right thereto as against anyone not doing business in the same geographical limits; and even as against those who are, if they fraudulently use the name for the purpose of misleading buyers, as to the actual origin or quality of the thing produced or sold, or to palm off the goods of one person as those of another. *French Republic* v. *Saratoga Vichy Company*, 191 U.S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247, and cases cited. In *Shaver* v. *Heller & Mertz Company*, 208 Fed. 821, 48 C.C.A. 48, the authorities (including those cited in behalf of defendents in this case) are very carefully and fully reviewed by the circuit court of appeals for this circuit, and the principles deducible therefrom stated by Sanborn, C. J., substantially are as follows: (1) The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction. (2) Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trade-marks. (3) But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity to the same extent as those of any other terms or symbols. (4) A proprietary interest in terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not essential to the maintenance of a suit, to enjoin perpetration of the wrong, but an interest in the good-will of a business or in the property threatened is sufficient. Since these decisions, it only remains to determine whether or not the complainant's use of the word "Elgin" in connection with its trade, product, and place of business has been such that it has acquired this secondary meaning; and the defendants have made such fraudulent use thereof as will entitle the complainant to prevent their further

use of the same. That the complainant has made such continuous and uninterrupted use of the word "Elgin" for at least 30 years as a part of its trade name and to indicate the place, character, quality, and product of its manufacture, and for the general advertising thereof, as that the word has acquired this secondary meaning in connection with its trade and product does not admit of doubt.

It also appears that prior to December, 1902, W. F. Main and M. F. Price, as partners, were conducting a jobbing and wholesale jewelry business, including the sale of watches and timepieces generally, at Iowa City, Iowa, under the name of the "Equitable Manufacturing Company." The defendants Loveland and Records were employees of Main and Price at Iowa City, where they then and ever since have lived. In that month said defendants purchased from Main & Price the business of the Equitable Manufacturing Company, and soon thereafter associated the defendant Harrison with themselves in the conduct of such business. In the latter part of January, 1903, the defendants began the use of the word "Elgin" as a part of their trade name under which they did business, and in connection with the word "Ill." to indicate the place of such business and of the manufacture of the products or goods in which they dealt.

It is urged that the business of the defendants as conducted by them is not in competition with that of the complainant; that complainant manufactures watch movements only; that defendants do not manufacture movements, but confine their business to sales of watches upon mail orders only, and assortments of jewelry, silverware, and other goods of a cheap class, in which complainant does not deal, and therefore no injury results or can result to it. It is true that complainant could not complain of the use of the word "Elgin" by a manufacturer or vendor of some product not of the same general kind as the complainant's. Such a business would not be in competition with it. If a watch or watch movement, however, is not included in the general term "jewelry," it is so closely associated therewith that the public in general regard the dealing therein as a part of the jewelry business, and they are generally handled by jewelers, and in fact are a branch of the jewelry trade. This is clearly shown by complainant's proofs, and it is plain therefrom that the continued use of the word "Elgin" by the defendants as used by them, is liable to and will confuse and deceive buyers quite generally, and lead many to believe that the jewelry sold and offered for sale by defendants is that of complainant's manufacture; and

that defendants are using this word as a part of their trade name to palm off upon the public their own jewelry as the product and manufacture of complainant, and that this will cease only when such use of said word ceases.

The conclusion, therefore, is that the proofs show prima facie that a preliminary injunction should issue against the defendants as prayed for, in so far as their jewelry and watch trade is concerned. Upon the giving of a bond by the complainant in the penal sum of $10,000, with sureties to be approved by the clerk of this court, a preliminary writ of injunction may issue to the extent indicated. It is ordered accordingly.

QUESTIONS

1. Does the court in this case lay down any rule for determining how long a name must be used before it acquires a secondary meaning?
2. P begins an extensive advertising campaign of a chewing gum, using the name "American Girl" in all of his advertisements. Before the article is placed on the market, D with knowledge of P's advertising campaign begins to sell a gum under the name of "American Girl." To what relief, if any, is P entitled?
3. In the foregoing case, P's gum has been on the market three months, before D begins to sell his. To what relief, if any, is P entitled?
4. P begins to sell ice-cream under the name of "The Velvet Kind" and creates an extensive demand and reputation for his product in the city of Chicago under that name. D, knowing of P's product, begins to manufacture and sell a cream under the same name in Evanston and in surrounding suburbs. To what relief, if any, is P entitled?
5. P places on the market a broom under the name of "Sweep-Clean." The name quickly acquires a secondary meaning in the Middle West. D, in ignorance of P's broom, begins to sell the same article in the South under the name of "Sweepclean." To what relief, if any, is P entitled?
6. In the foregoing case, D adopts his trade name with knowledge of P's article and its name. To what relief, if any, is P entitled?
7. When P began to manufacture and sell his broom under that name, he intended to create a national market as soon as his finances would permit. D adopts his name with knowledge of P's intention. To what relief, if any, is P entitled?
8. Was the defendant really in competition with the plaintiff in the principal case? If not, why should the defendant have been enjoined from the use of the word "Elgin"?

II. INFRINGEMENT OF TRADE-MARKS[1]

SCHNEIDER *v.* WILLIAMS

44 New Jersey Equity Reports 391 (1888)

VAN FLEET, V. C. The question to be considered is, Does the bill show a property right in the complainants and their fellow-members in the trade-mark in question? This is, however, preceded by another, which is, How may property in a trade-mark, or a right to a trade-mark, be acquired? It would seem to be settled beyond question, that there can be no such thing as a trade-mark distinct from and unconnected with a vendible commodity. As the words themselves import, to make the thing selected or adopted answer the purposes of a trade-mark, it must be so used as to mark or distinguish something which is the subject of traffic—something which is bought and sold. It can have no existence as property or a thing distinct from and wholly unconnected with an article of traffic, for in that condition, while it might be the subject of traffic itself, it would be simply as a mark or name, and not as the distinguishing mark of some other article of traffic. It is only when it is affixed to or associated with some vendible commodity, so as to distinguish that particular commodity from others of the same class or kind, that it is possible for it to possess the essential quality of a trade-mark. The right in question was defined by Lord Westbury, in *Hall* v. *Barrows*, 4 DeG., J. & S. 150, 158, to be "the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity." And JUSTICE CLIFFORD, in a dissenting opinion, in *Manufacturing Company* v. *Trainer*, 101 U.S. 51, 57, said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class, the rule being, that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents." And Mr. High, in his treatise on the Law of Injunctions, says: "A trade-mark is a particular sign or symbol, which, by exclusive use, becomes recognized as the distinguishing mark of the owner's goods, and for the protection of which the aid of equity may be properly invoked." High on *Inj.*, 1063.

[1] In connection with the study of the cases on trade-marks, the student should consult the extracts from the Federal Trade-Mark Act, Appendix B, *infra*, p. 623.

The principle that no person can acquire a right to a trade-mark, except he put merchandise or a vendible commodity on the market, marked or distinguished by his particular mark, has been repeatedly affirmed by judges of the very highest distinction. The cases so adjudging are numerous. I shall not cite all which have been examined. LORD WESTBURY, in *Leather Cloth Company* v. *American Leather Company*, 4 DeG. J. & S. 137, 142, said: "It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark, apart from the use or application of them, but the word trade-mark is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property." The same distinguished judge, in *McAndrew* v. *Bassett*, 4 DeG. J. & S. 380, 386, said: "Property in the word for all purposes cannot exist, but property in that word, as applied by way of stamp upon a particular vendible article, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of a superior quality, or some other circumstance which renders the article so stamped acceptable to the public."

From this statement of the law, it would appear to be entirely clear, that a person who desires to acquire a right to a trade-mark must do three things, each of which is indispensably requisite to the acquisition of the right. First, he must select or adopt some mark or sign not in use to distinguish goods of the same class or kind already on the market, belonging to another trader; second, he must apply his mark to some article of traffic; and third, he must put his article, marked with his mark, on the market. Mere adoption of a mark or sign, and a public declaration, by advertisement or otherwise, that a person will, at a subsequent time, put a particular thing on the market, marked or distinguished in a certain way, creates no right. Until the thing is actually on the market, marked by the particular mark of the person intending to acquire a title, no property right in the mark arises. *Lawson* v. *Bank of London*, 18 C.B. 8.

QUESTIONS

1. In the opinion of this court, what steps must one take who wishes to acquire a right to a trade-mark? Has the court stated all the necessary elements in the acquisition of a trade-mark?
2. What is the difference between a trade-mark and a trade name? A trade-mark and a trade design?

3. What is the function of a trade-mark? What is the function of a trade name? a trade design?
4. It is said that a trade-mark indicates "ownership and origin of goods." In what way does a trade-mark do this?
5. What is meant by the statement that "a trade-mark is the commercial signature of a trader"?
6. "A trade-mark is a part of the good-will of a business." Explain this statement. Is a trade-mark a property right?
7. What is meant by the statement that a trade-mark cannot "exist in gross"?
8. "In 1452, a guild statute of Lubeck provided that 'every crossbow maker shall place his mark upon the bow of each bow that he makes, in token that he has done and will do his work in a proper manner.'" What is the significance of this guild statute?

GEORGE *v.* SMITH

52 Federal Reporter 830 (1892)

Coxe, D. J. The complainants are packers of salmon at Astoria, Oregon. The defendants are wholesale grocers in the city of New York. The controversy relates to the use of the word "Epicure" as a trade-mark for canned salmon. After a careful investigation, which discovered no instance of similar use, the complainants, on the fourth of August, 1885, registered the trade-mark in the patent office. The application was filed July 7, 1885, and stated that the trade-mark had been used in their business since June 20, 1885. For a few years prior to the latter date the defendants, at intervals and to a limited extent, had used the word as a trade-mark for canned tomatoes and canned peaches. The complainants were, therefore, the first to use the word "Epicure" as a trade-mark for canned salmon. The defendants were the first to use it as a trade-mark for canned tomatoes and canned peaches. The simple question, then, is whether the defendants' use of the word as applied to tomatoes and peaches prevented the complainants from selecting it as a trade-mark for salmon. The complainants had built up an extensive business in canned salmon under this name before the defendants asserted their right to apply it to all canned goods sold by them, salmon included. It is stated that the complainants have sold about 3,500,000 packages of "Epicure" salmon. Their business is large and flourishing. It is devoted exclusively to salmon packing. In the summer of 1891 the defendants sold one dozen cans of salmon

bearing this brand. It is asserted that this was done for the purpose of testing the question now presented.

The rights of the parties must be ascertained and measured by the situation as it existed in 1885 when complainants entered the field. Had they the right at that time to use the word "Epicure"? If the defendants had then sought to restrain the complainants' use of the word they would, in all probability, have been dismissed from court with the information that their business as dealers in fruit could not be injured by the use of the term "Epicure" in salmon packing. No one who has not permanently parted with his wits could purchase a can of salmon supposing he was getting a can of tomatoes. "Epicure" when used, in 1885, by the defendants meant fruit; when used by the complainants it meant salmon. If the complainants' use of the word could not have been enjoined in 1885 their right to it should not be destroyed now. If lawful then it should be protected now. The word was free to the complainants. They were engaged in a distinct line of industry. Its use could not possibly have harmed the defendants.

The complainants, unmolested by the defendants or anyone else, and molesting no one themselves, have labored during seven years to establish a valuable industry distinctively their own and distinguished the county over their trade-mark. The word "Epicure" is inseparable from and commensurate with their business. It is their seal of genuineness, their guaranty to purchasers that the goods so labeled are of a superior quality. The advantages of higher prices and larger demand exist because of the established excellence of the goods. These are advantages which belong to the complainants. Whatever value "Epicure" has as a brand for salmon was imparted to it by them. To transfer the good-will thus secured by years of arduous and conscientious endeavor to the defendants, or to throw it open as a poaching ground for the general public, would be doing the complainants gross injustice.

It is not pretended that the complainants knew of the defendants' use of the word "Epicure" prior to 1885, but even if they had known of it, it is not easy to see how complainants' use of the word violated any principle of business morality. Salmon and tomatoes are both articles of food it is true, but in other respects differ as a hat differs from a boot—though both are articles of wearing apparel. A hat dealer having built up a flourishing trade in "Sheridan" hats could not be compelled to relinquish it at the instance of a shoemaker who,

before that, had sold "Sheridan" boots. An oyster packer on the Chesapeake who has established a valuable market for "Columbia" oysters ought not to be despoiled of his profits because an orange grower in California had previously sold "Columbia" oranges. A manufacturer who should call his bicycles "Deerfoot," would hardly interfere with "Deerfoot" sausages or "Deerfoot" butter.

There is little similarity between a salmon and a tomato. In a commercial sense the want of resemblance is marked. The business of a fruit packer does not include salmon; the business of a salmon packer does not include tomatoes and peaches. Salmon is not a species of the genus "fruit" or of the genus "vegetables." The contention that the use of the trade-mark on canned fruit in 1885 pre-empted its use for all time in connection with canned goods of every variety, in defiance of the rights of intervening users, cannot be maintained. Such a contention would prohibit its use not only on salmon but milk, lard, petroleum, and even gunpowder. In 1890 the defendants commenced using the term "Epicure" as a brand for cigars, but it is clear that they could not have done so if a cigarmaker had so used it continuously since 1885.

The reasoning of some of the authorities would indicate that the defendants had a right to use the brand in connection with other fruit and vegetables, analogous to tomatoes and peaches, but to assert that they have the right to use it on all canned goods is carrying the doctrine far beyond any reported case. Beer and nails do not belong to the same class of merchandise because both are sold in kegs. The fact that the defendants have subsequently extended their business so as to include fish and other like articles of food does not avail them, neither would the fact if it existed, that, at the time they adopted the word "Epicure" they intended in the future to embrace these articles. One may conceive a valuable idea, which, if properly carried out and developed, entitles him to a patent and to enjoy the rewards of an inventor, but if the idea continues to remain an idea and someone else first embodies it, the idealogue will presently discover that he has furnished another illustration of the superior value of facts over theories as commercial commodities. So with a trade-mark. It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it. The law deals with acts, not intentions.

The equities are with the complainants. Their large and flourishing business will be destroyed or jeoparded if the defendants and others are permitted to share the good-will which has been established for the "Epicure" brand of salmon. No corresponding injury can befall the defendants if they desist in the future as in the past from using the word "Epicure" as applied to salmon. If the defendants' statement of the amount of their sales is correct, there can be no occasion for the services of a master. It follows that the complainants are entitled to a decree for an injunction, with costs.

QUESTIONS

1. Upon what ground was the complainant granted relief in this case?
2. The defendant had used the word "Epicure" before the plaintiff had used it. Why was he not entitled to the exclusive use of it as against the plaintiff?
3. P offers a prize to his trade for the best word to be used as a trade-mark for his canned salmon. "Epicure" is decided upon. Before the word is ever used by P, D begins to sell salmon under the same name. To what relief, if any, is P entitled?
4. P decides to use the word "Epicure" as a trade-mark for canned salmon and advertises his product very extensively under that name. Before the goods are actually placed on the market, D begins to sell salmon under that name. To what relief, if any, is P entitled?
5. P placed on the market a complexion powder which he called "Swann Down." Within three weeks thereafter, D began to sell a complexion powder under the same name. To what relief, if any, is P entitled?
6. P built up an extensive demand and reputation for a pancake preparation under the name of "Aunt Jemima's Pancakes." D later began to sell salmon in similar cans, called "Aunt Jemima's Salmon." To what relief, if any, is P entitled?
7. For years P had sold a shoe for women under the name of "The American Lady Shoe." D began to sell a hosiery for women under the name of "The American Lady Hosiery." To what relief, if any, is P entitled?
8. What must be the extent of use of a mark before one gains an exclusive right to it as a trade-mark? What must be the extent of use of a trade name, trade design, or trade dress before one is entitled to protection against competitors?
9. P and others, manufacturers of linoleum, formed a Protective Association. D began the sale and manufacture of a cheap substitute for linoleum under the name of "linoleum." To what relief, if any, is the Protective Association entitled?

ST. LOUIS PIANO COMPANY *v.* MERKEL

1 Missouri Appeal Reports 305 (1876)

Gantt, P. J. The St. Louis Piano Manufacturing Company instituted proceedings against the appellants, charging them with pirating its trade-mark, and asking an injunction, and for damages. It declared that it manufactured pianos of a particular kind, and distinguished its manufacture as the "Bell Treble" Piano. This name, it contended, it had appropriated. Its work was known by it, and defendants had done it a wrong by usurping it. It stated that it first adopted the name "Bell Treble" as a trade-mark, under which name it has ever since extensively advertised its pianos, by circulars and newspaper advertisements, having the words "Bell Treble," in prominent letters, usually stamped across the representation of a piano; which name served to distinguish plaintiff's pianos and business from those of other persons.

The defendants answered, ignoring the advertisement of plaintiff's pianos, as alleged, and denied that they had ever used the words "Bell Treble" as a trade-mark for their work. They denied that the words were first used by plaintiff to distinguish its work. They denied any appropriation of the term by the plaintiff. They claimed that the term had been long known to musicians and manufacturers of pianos; that it was descriptive of a particular "part, or attachment, or appliance to a piano," which said part of the piano all manufacturers of pianos have a perfect and undisputed right, in this and other countries, to use; that one of the defendants had actually used the term, and manufactured pianos in St. Louis to which the name was affixed; that defendants have never manufactured or sold any pianos to which the words "Bell Treble" were affixed, or in any way appeared on the pianos; and that the plaintiff had never manufactured or sold any pianos to which the said words were affixed, or in any way appeared; that plaintiff could only appropriate the term as a trade-mark by so affixing it; and, consequently, defendants prayed for a dissolution of the injunction which the court had preliminarily granted. A reply to this answer was filed.

The court, at the hearing, perpetuated the injunction, and, after the usual motions, defendants appealed to the General Term, and to this court.

The bill of exception shows a great volume of testimony directed to the question of the priority of plaintiff's right to the use of the

term "Bell Treble." It did not appear, and indeed, it is not alleged in the petition, that the name "Bell Treble" was affixed to, or marked on, the goods of the plaintiff. It was only claimed that it was used in its advertisements. The defendants appear to have distinguished some pianos of their manufacture with this name, by marking it on them. The manner of putting the mark on the instrument does not clearly appear. Apparently it was done by pasting a label on part of the piano. This was done some time after the plaintiff had advertised its pianos as the "Bell Treble" piano. The evidence seems to us greatly to preponderate in favor of the conclusion that the plaintiff was the first manufacturer which used the term "Bell Treble" in its advertisements to distinguish its work. We are also of opinion that the term itself is a combination of words which was capable of appropriation as a trade-mark. The question which has given us serious trouble is whether the plaintiff, which was, as we think, the first manufacturer which attempted to appropriate the term as a trade-mark, ever did anything effectual for the purpose of such appropriation.

We have seen that it was never affixed to any work of the plaintiff. Of course, in some cases, the work or manufacture itself which is to be thus distinguished cannot receive the mark, as would be the case in respect of a powder or liquid which is advertised or offered for sale. But, in such instances, the package or bottle containing the article can receive, and, as far as we are able to see, always has received, the mark in which a property is claimed. The very term employed seems to require that the article distinguished, or which the manufacturer or salesman seeks to distinguish as coming within the designated description, should bear the *mark* which gives it its character. A trade-mark which is not in some manner put upon or affixed to the article indicated by it is almost a contradiction in terms. The article can scarcely be said to have the mark, in any natural or reasonable sense.

From the best examination we are able to make of the subject, we are led to the conclusion that, so far as an article of merchandise is concerned, it can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon the article as the same offered for sale. The purchaser must be told that the particular thing he proposes to buy is of this or that character, by something connected with the thing itself. He must not be referred to some circular or advertisement for this assurance, nor can he receive it from the representations, by word of mouth, of the manufacturer or salesman. The impossibility

of putting any restrictions upon the last may be a sufficient reason for not making the attempt; but the other branch of the proposition seems to be equally settled by judicial opinion. "A symbol does not become a trade-mark until it is actually stamped upon, or otherwise affixed to, the goods to be sold," is the language of Browne, in his treatise on *Trade Marks*, section 311. This remark seems abundantly justified by the decisions of the courts which have adjudicated respecting trade-marks, besides being in harmony with what anyone of ordinary understanding would infer from the name itself.

In 2 Brewster, 333 (*American Trade Mark Cases*, 486–89), JUDGE LUDLOW's attention was drawn to this point. *Rowly* v. *Houghton*. This conclusion was in conformity with a former decision that "no right can be absolute in a name, as a name merely. It is only *when that is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods*, that it becomes a trade-mark."

In 54 Illinois, 439 (456, 457, for the passage cited), this point underwent a careful and accurate examination. The case was that of *Candee, Swan & Co.* v. *Deere & Co.* JUSTICE BREESE quotes the definition of the term trade-mark from Upton, and announces, as a conclusion which has his concurrence, that it is "a symbol, or emblem, or mark which a tradesman puts upon, or wraps, or attaches in some way to the goods he manufactures; name, symbol, figure, letter, form, or device adopted or used by a manufacturer or merchant, in order to designate the goods he manufactures or sells, to the end that they may be known in the market as his."

Without quoting more largely from this decision, we content ourselves with saying that we adopt the result of it, as far as the present question is concerned. We think that a trade-mark must be annexed to the article offered for sale; and that, if not so annexed, the article cannot be said to have a trade-mark. In the case at bar, the pianos of plaintiff had no such symbol affixed, annexed, stamped, or engraved on them as plaintiff claims to belong to it, and it follows that, in our judgment, the plaintiff was not entitled to the injunction for which it prayed.

QUESTIONS

1. Why was the plaintiff denied the relief for which he asked in this case?
2. Even if the plaintiff did not have a valid trade-mark in the words "Bell Treble," was there no other theory upon which he might have asked for and obtained relief?

3. P manufactures and sells a summer beverage known as "Coca-Cola." The word "Coca-Cola" is blown into each bottle in which the drink is sold to the consumer. P asks that D be enjoined from violating his trade-mark by using the word "Koka-Kola" in imitation thereof in the sale of a drink. What decision?
4. P manufactures and sells a chewing gum, customarily sold to the consumer in packages, each package containing five small cakes wrapped separately. On the wrapper around the five cakes are printed the words "Honey Dew Gum—Trade Mark," inclosed in a rectangle with other decorative features. D later begins to sell a gum which he calls "Honey Dew Gum" but does not otherwise imitate the package of P. To what relief, if any, is P entitled against D?
5. P makes and sells an alarm clock under the name of "Big Bill." These words are printed on a circular tag and attached to the clock with a string. P alleges that D is infringing his trade-mark and asks that he be enjoined from using the words "Big Bill" in manufacturing and selling alarm clocks. What decision?
6. To what articles may a trade-mark validly be attached? To manufactured products? To mineral waters? To fruits? To vegetables? To cattle? To meat? To services?
7. P sells shoes which are manufactured by X. Is P entitled to protection of a mark of his own which he affixes to the shoes before offering them to his trade?
8. P manufactures and markets goods under three different marks, alleging that each is a trade-mark. D begins to use one of them on competing goods of his own. To what relief, if any, is P entitled?
9. Is a trader entitled to protection of a trade name before he has placed the goods, bearing the name, on the market? Is a trade name protected even though it is not affixed to the goods which it identifies?
10. P, a manufacturer of breakfast food, issued advertisements, consisting of a picture of a young woman and these words: "Wink at the grocer and see what you get." The purpose of this advertising was to excite curiosity and to attract attention to subsequent advertising which would disclose the character of goods advertised and the name of the manufacturer. Before this explanatory advertising was done, D issued advertisements, consisting of a picture of the same young woman, receiving from the grocer a jar of D's marmalade, and these words: "This is what she got." What are the rights, if any, of P against D?

CONNELL *v.* REED

128 Massachusetts Reports 477 (1880)

GRAY, C. J. This is a bill in equity to restrain the defendant from infringing upon an exclusive right claimed by the plaintiff in the words "East Indian," used together with the word "remedy" or "remedies," as a trade-mark upon bottles of medicine.

Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words in connection with the manufacture and sale of medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right. *Canal Company* v. *Clark*, 13 Wall. 311; *Taylor* v. *Carpenter*, 3 Story, 458; *Gilman* v. *Hunnewell*, 122 Mass. 139, 148.

But the conclusive answer to this suit is that the master has found, upon the evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public. *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefit*, 6 Beav. 66, 76; *Leather Cloth Company* v. *American Leather Cloth Company*, 4 DeG., J. & S., 137, and 11 H. L. Cas. 523, 532, 542, 548; *Palmer* v. *Harris*, 60 Penn. St. 156.

The decree dismissing the bill must therefore be affirmed with costs.

QUESTIONS

1. Why was the bill of the complainant dismissed? In any event, did the plaintiff have, or could he acquire, an exclusive right to the use of the words in question as a trade-mark?
2. Does the rule laid down in the latter part of this case apply also when a plaintiff is seeking to prevent unfair competition by another in imitating the trade name of the former?
3. P manufactured and sold a soap under the name of "Balm of a Thousand Flowers"; in his advertisements he led the public to believe that the name indicated the origin of its scent; and claimed for the soap wonderful curative qualities. P asks that D be restrained from using the name in the manufacture and sale of soap. D replies that the only connection

between the name of P's soap and the soap is that at one time it contained a slight quantity of honey; and that therefore P is entitled to no relief. What decision?

4. P manufactured and sold a toothbrush under the name of the "Red Cross Brush," with an imitation of the emblem of the Red Cross. P asks that D be restrained from selling brushes under the same name and with the Red Cross emblem stamped upon them. D relies upon two defenses: (*a*) That the name as used by the plaintiff is deceptive. (*b*) That it is against public policy for a trader to use the emblem of the Red Cross. What decision?
5. P manufactured a soap in Iowa which he called "Old Country Soap." He asks that D be restrained from infringing upon his trade-mark by selling soap under the same name. What decision?
6. What provisions are found in the Federal Trade-Mark Act with reference to the use of deceptive and fraudulent marks and designs? With reference to the use of flags and emblems?

NOEL *v.* ELLIS

89 Federal Reports 978 (1896)

The bill alleged that in 1892 the defendant, Ellis, was a general agent for complainant, Noel, for the sale of a medicinal preparation in the form of a powder, put in envelopes, and extensively advertised and known to the public by the name of "Vitae-Ore," or the initial letters "V-O." In 1895, while agent, Ellis began to advertise and sell a preparation of his own, similarly dressed, and called "Vitalizing Ore," or "Vitalizing T Ore." Ellis sold his preparation generally, but more particularly to local agents, and offered them inducements to buy of him. Ellis also substituted his preparation for Noel's on orders received by Ellis from local agents for "Vitae-Ore" or "V-O." The shape and size of Noel's envelopes or packages, and the printing thereon, were simulated by Ellis. Complainant charged defendant with infringement, and with unfair competition in business, by reason of such similitude and the substitution of the spurious for the genuine article. On motion by complainant for a preliminary injunction, Ellis alleged breach by Noel of his contract of agency as a justification of his conduct, and also urged that as his preparation was a product of nature, and vitalizing in character, he had the right to designate it by such descriptive name, regardless of its resemblance to Noel's trade-marks in sound and appearance.

Woolson, D. J. The matters of contract alleged by defendant as justification are not relevant to the case in issue, but would be the

subject of an action for damages. In the case now before the court, the question is, has the defendant imitated and copied the signs, phrases, and trade-marks of the complainant's goods, and has he attempted to put the imitation upon the market, using fraudulent means, to complainant's injury? In the case of *Pillsbury* v. *Pillsbury*, 12 C.C.A. 432, 64 Fed. 841, the question was whether a man had a valid trade-mark in his own name to the exclusion of any other man having the same name. The court there held that, if a man should adopt his name as a trade-mark, he could not prevent another man of the same name from using his name, and applying it to goods he might place on the market, provided that no means of unfair competition were resorted to. Now, in that case the complainant showed that they manufactured a grade of flour to which they had applied the term "Best," and further used the name "Pillsbury," and the mark "XXXX," inclosing it in a wreath. The evidence showed that the defendant had not only used the name "Pillsbury," but had also used the other words adopted as a trade-mark by the complainant, and that the initation was such as would tend to mislead intending purchasers. Unfair means of competition having been resorted to, the court granted the injunction. Can descriptive words be the subject of a valid trade-mark? According to the doctrine of trade-mark law, they cannot be. At the same time the courts have decided that the originator is entitled to certain proprietary rights in a name which he has used to designate a certain article, and for which he has given the public to understand is an article prepared by him, so that certain words which certainly contain elements of description have been declared by the courts to be valid trade-marks. Such is the case of "Cottolene." In the case referred to by Mr. Hibben (*American Grocery Company* v. *Sloan*, 68 Fed. 539), the word "Momaja" was a word made up from the first two letters of the words "Mocha," "Maracaibo," and "Java" coffees, and was applied to a certain brand of coffee which was a mixture of these three. Most certainly this word was, in a sense, descriptive; but the courts decided that it was a valid trade-mark, and that the word "Mojava" was an infringement of it, so that, even though the word "Momaja" contained the suggestion of the contents of the package, still this suggestion was not sufficient to class it among those terms of a purely descriptive nature.

Coming to the case before the court, the question is, has the complainant a valid trade-mark in the words "Vitae-Ore"? If he

had used the words "Ore of Life," and applied them to his product, they perhaps might not have been a valid trade-mark, inasmuch as it might be a generic term, and descriptive. But he does not do so, and instead uses the word "Vitae," which, even though it is the Latin of "Life," is still a fanciful word; and he couples the word "Vitae" with the word "Ore," and calls it "Vitae-Ore," bringing in another word which had not been heretofore connected with the word "Vitae" or applied to a medicine or a preparation of a medicinal nature, so far as the court is advised or has been able to discover; so that the complainant has proprietary rights in the name, inasmuch as he has been the first person to thus apply the words "Vitae-Ore" to a medicine. Whether or not the product of the complainant is really an ore has not been contended by either party, so that the court assumes that it is an ore. If, however, the complainant should prove that it is not an ore, the case might be stronger; but for the present time, assuming that it is an ore, the question is, are the words "Vitae-Ore" descriptive? The court is unable to discover anything that these words could describe, and thinks that is a purely fanciful name, and was arbitrarily selected by the complainant to designate his goods. Therefore it is the opinion of this court that the complainant may have a good and valid trade-mark in the words "Vitae-Ore."

The question is, has the defendant infringed on the trade-mark of the complainant? If he had called the preparation "Vital Ore," there would be no question about it being an infringement, because there would be simply the change of one letter. Now, how much farther can this doctrine be carried, and does the adding of the letters "i-z-i-n-g" to the word "Vital" remove it from the charge of infringement? In the words "Vitalizing Ore" the same general suggestion is contained, and in either case the suggestion would be the same, because the English words "Vital" and "Vitalizing" mean practically the same, and the addition of the last letters would not materially change the meaning. There can be no question but that the word "Vital" would be an infringement of "Vitae"; and it is the opinion of the court that the word "Vitalizing" is so similar in sound, if not in appearance, as to be calculated to mislead and deceive the public and intending purchasers. In a trade-mark case coming before me last December, the plaintiff had taken the name of "White Rose Flour," and the defendant introduced evidence showing that the words "White Rose" were used by a number of mills to represent a certain quality of flour; but in that case the question was whether or

not the words "White Rose" could be a valid trade-mark, and, from the evidence produced, the court decided that they might, as applied to flour. There is no question that mere locality cannot be the subject of trade-mark, as in the case of Lackawanna, Columbia, and other cases cited. These are the names of locality. If the complainant had called his preparation "Chicago Ore," there would be no trade-mark, but I cannot see why the words "Vitae Ore" cannot be the subject of a valid trade-mark.

But, leaving this subject, the proof introduced in this case shows the putting out by defendant of a product he called "Vitalizing Ore," as being equivalent to "Vitae Ore," and in some cases as being "Vitae Ore." The relation existing in the past between him and the complainant gives him a vantage ground from which to press the sale of his preparation as an article which would be so similar as to mislead the public into the belief that it was the product of the plaintiff—in one case sending out the original circulars with the imitation. This, without doubt, was intended to cause a deception, and it looks to be a very strong case of unfair competition. The words "Vitalizing Ore" are so similar as to tend to deceive the purchasers. The packages, while being of the same general shape, size, and color, are somewhat dissimilar in appearance; yet there are many phases of the same general idea, and the goods of the defendant are put up in the same dress, and the wrapper contains substantially the same phraseology, as that of the complainant. There can be no protection in stamping the name of the manufacturer in red ink, as that would not, in that respect, tend to confuse or deceive, but the public may be misled by the similarity of dress and of phrases. It seems to this court that the evidence is in one direction, and the court cannot see how he can refuse the application of the complainant for a preliminary injunction, and I think the defendant should be restrained pending the case.

QUESTIONS

1. Were not the words used by the plaintiff as the name of his commodity descriptive of its quality? If so, upon what theory were they protected?
2. Does it seem that the words used by the defendant violated the rights of the plaintiff? What is the test as to whether one's trade-mark is infringed upon by another?
3. Can the following words be appropriated as trade-marks? (*a*) "Ruberoid" for a roofing material; (*b*) "Computing" for scales; (*c*) "Keepclean" for scouring brushes; (*d*) "The Velvet Kind" for ice-cream; (*e*) "Spearmint" for chewing gum; (*f*) "Rubberset" for brushes;

(*g*) "Cream" for rolled oats; (*h*) "Ever-Ready" for a coffee mill; (*i*) "Green Mountain" for grapes; (*j*) "White Swan" for flour.

4. Can the following words be appropriated as trade-marks? (*a*) "No-To-Bac" for a medicine; (*b*) "Cedarine" for a furniture polish; (*c*) "Hygeia" for a distilled water; (*d*) "Coca-Cola" for a beverage; (*e*) "Virgin Leaf" for chewing tobacco; (*f*) "Red Cross" for tooth-brushes.
5. Can the following words be appropriated as trade-marks? (*a*) "Momaja" for coffee; (*b*) "Cottolene" for a lard substitute; (*c*) "Cuticura" for a hand and face soap; (*d*) "Uneeda" for crackers.
6. Can the following words be appropriated as trade-marks? (*a*) "Congress Water" for a mineral water; (*b*) "Tea Rose" for flour; (*c*) "Radium" for silk; (*d*) "Pain Killer" for medicine; (*e*) "Rising Sun" for a stove polish.
7. Can the following words be appropriated as trade-marks? (*a*) "Gold Medal" for flour; (*b*) "Royal" for baking powder; (*c*) "Monarch" for a bicycle; (*d*) "Pride" for cigars; (*e*) "Marvel" for flour; (*f*) "Queen Quality" for shoes.

APOLLO BROTHERS *v.* PERKINS

207 Federal Reporter 530 (1913)

Rellstab, D. J. In the court below Charles B. Perkins, trading as Charles B. Perkins and Company, a citizen of the state of Massachusetts, the appellee, filed his bill in equity against Apollo Brothers, Incorporated, a corporation of the state of Pennsylvania, the appellant, alleging a common-law property right in a trade-mark for cigarettes, and also infringement and unfair competition by defendant, and praying for relief by an injunction and an accounting. The trade-mark name claimed by complainant was the geographical name "Nubia," which it is admitted he was the first to appropriate and adopt for cigarettes manufactured and sold by him. It was also claimed that the name had acquired, through long use by him, a secondary meaning, indicating the origin and ownership of the goods upon which it was impressed. The infringement charged against the defendant was in selling cigarettes manufactured by him, put up in sealed boxes for sale, with a label containing the word "Nubias" and "Apollo Brothers." The court below found in favor of the complainant, and awarded a perpetual injunction against the corporation defendant, its officers, agents, etc., restraining them from using the word "Nubias" as a name or designation for the cigarettes

made and sold by said defendant. From this decree the defendant has appealed.

The contention of the defendant in the court below, as here, was that the word "Nubia" claimed by complainant as a common-law trade-mark, was incapable of exclusive appropriation as such, by reason of its being a geographical name, and further, that, whether such name has acquired a secondary meaning or not, the user's right in it can be infringed by nothing less than acts amounting to unfair competition.

The material facts in the case are not in dispute. Complainant commenced the manufacture of his cigarettes under the name "Nubia" in 1898. He testifies that that designation was arbitrarily chosen as a somewhat fanciful one, and that since then he has continuously marketed them under that name. The cigarettes were put up in small sealed boxes convenient for the pocket, and the label on the lid containing the word "Nubia" at the top and the words "Charles B. Perkins, Boston, Mass., U.S.A." in distinct letters at the bottom, has on its middle portion a picture representing a sunset in the desert, with pyramids and camels suggesting an Egyptian scene.

The defendant entered into the cigarette business in Philadelphia in December, 1905, and in 1906 manufactured and marketed cigarettes under the name of "Nubias" which they have since manufactured and sold. Defendant's cigarettes seem to have been put up in sealed cases of about the size of those of the complainant, intended for pocket use, with a black label on the side containing nothing but the words "Nubias" and "Apollo Brothers."

We agree with the court below "that 'the evidence does not support the charge of unfair competition. The two brands of cigarettes are not offered to the same market, and do not compete in fact.' " The package of the defendant, its coloring, printing, and form were so radically different from the plaintiff's that they could not be mistaken for each other and could never have been used to deceive. The complainant's right to the relief prayed for, therefore, depends upon his having secured a technical trade-mark in the word "Nubia."

There is much confusion in the cases, but to our mind the best considered cases hold that it is essential that such a trade-mark possess the following characteristics: That either in meaning or association the mark points distinctively to the origin or ownership of a commercial article, and that it is of such a nature as to permit of an

exclusive appropriation by one person. Nims on *Unfair Business Competition*, section 2. "Nubia," it is admitted, is a geographical name, and there is nothing in the circumstances of its selection and use by the complainant (such as was found in *Baglin* v. *Cusenier Company*, 221 U.S. 580) that would permit of its registration under the Trade-Mark Act, section 5 of which denies registration to marks which consist of "merely a geographical name or term." Not only is it incapable of official registration but it may not be exclusively appropriated by anyone. *Nat. Watch Company* v. *Ill. Watch Company*, 179 U.S. 665.

We agree that a geographical name may, by use and association with a commodity, obtain a secondary meaning indicating that the goods bearing it come from one and the same source, and thus a superior right may be secured in the use of such name by one person; but, inasmuch as no absolute ownership in or exclusive right to use such name as a trade-mark vests in anyone, the rights obtained by the first user are not infringed by the mere use of such mark by a competitor, even though such use is in association with competing goods. In such a case the second user becomes an infringer only when he makes an unfair use of such name. Not any competition, but only unfair competition, on the part of such user is actionable. *Canal Company* v. *Clark*, 80 U.S. 311; *Columbia Mills* v. *Alcorn*, 150 U.S. 464.

The action to protect trade-mark rights, whether at law to recover damages, or in equity to restrain further infringement, is founded on a false representation. A technical trade-mark, registered or unregistered, is treated as property, and an infringement thereof carries with it the presumption of fraud, but where no such exclusive right to the use of such trade-mark exists, a technical trade-mark right is not established, and fraud—unfair competition—in the use of the trade-mark must be proved. *Elgin Watch Case*, *supra; Siegert* v. *Gandolfi*, 149 Fed. 100.

The policy of the law is to foster and not to hamper competition, and it only permits a monopoly in the use of a trade-mark when it has become the absolute and exclusive property of the first user—good against the world. A geographical name can never become such property, and the utmost the first user can insist is that no one else shall use it so as to constitute unfair competition. The purpose in an honest selection of a trade-mark is that it be an exclusive identification of the marked commodity with the personality of the owner, and

it is not too much to require that such selection be made from a class of subjects capable of exclusive ownership. When one fails in this, he has only himself to blame if by another's honest selection and use of a similar trade-mark he is denied an exclusive use thereof. In such a case commercial rights are apt to overlap, but the utmost that the courts can do in such cases is to enjoin, not the use of such a trade-mark, but the improper use of it—unfair competition.

The business of neither the complainant nor the defendant is carried on in Nubia, and neither handles the products of that region. As between the parties neither had a superior right of selection. Being the first to select such name gave the complainant no exclusive right in the use of it; but, being the first user, he has a right to protection as against any subsequent user who so uses the name as to bring to the latter the trade which belongs to the former, and in affording such protection the later comer will be required to so accompany the use of the name, whether on his goods or in advertising them to the trade or public, regardless of the trouble or expense to which he will be put, as is necessary to effect such purpose. *Amer. Waltham Watch Company* v. *U.S. Watch Company*, 173 Mass. 85, 53 N.E. 141, 43 L.R.A. 826, 73 Am. St. Rep. 263. Regulation, but not prohibition, is the remedy in such cases. To hold otherwise would be to give to one who could not register such name as a trade-mark all the benefits that such a registration would give, and preclude one innocent of any unfair trade dealing from using the name which the registration laws, by necessary implication, concede to be the common property of all. Or, stated differently, the complainant would be given all the rights flowing from an absolute ownership in a name in which he at best could only obtain a superior right.

In the present case, the complainant has no property but only a commercial right in such mark. He has as yet suffered no commercial injury. As his or the defendant's trade expands, some impairment of the complainant's rights may take place. Whether more distinguishing accompaniments to the use of the word "Nubias" may then be required, we cannot now say. As to such word, no prohibitive or injunctive relief is justified; and, as no unfair competition exists, regulative relief is not now called for.

The judgment of the district court is reversed, with costs.

QUESTIONS

1. Why was the plaintiff not granted protection of the word "Nubia" as a trade-mark?
2. Why was he not entitled to protection on the ground that the defendant by his use of the word "Nubia" was "palming off" his goods as the goods of the plaintiff?
3. Can the following words be appropriated as trade-marks? (*a*) "Elgin" for watches made in Elgin; (*b*) "Moline" for flour made in Moline; (*c*) "East Indian" for a medicine; (*d*) "Old Country" for soap; (*e*) "Columbia" for flour; (*f*) "Yankee" for soap; (*g*) "Metropolitan" for chocolate.
4. Can the following words be appropriated as trade-marks? (*a*) "Paris" for garters made in America; (*b*) "The American Girl" for shoes; (*c*) "Philadelphia" for cheese manufactured in New York; (*d*) "White House" for coffee.
5. Can a man by the name of Baker acquire a trade-mark in that name so that another person by that name cannot use it in his own business?
6. Can letters of the alphabet be appropriated as trade-marks? Can numerals be employed as trade-marks?

HANOVER STAR MILLING COMPANY *v.* ALLEN AND WHEELER COMPANY

208 Federal Reporter 513 (1913)

Suit in equity by the Hanover Star Milling Company against the Allen and Wheeler Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

Baker, Cir. J. Complainant, an Ohio corporation, owns and operates a flour mill at Troy, Ohio. Since 1872, it has used the words "Tea Rose" as a common-law trade-mark to designate one of its makes of flour. Though its bill and affidavits say generally that its trade extended throughout the United States, the only particulars exhibited disclose that its trade was within the territory north of the Ohio River. And the showing of the defendant clearly established, on the present record, that complainant never had any trade in its "Tea Rose" brand in the southeastern territory comprising Georgia, Florida, Alabama, and Mississippi. In recent efforts to establish a trade in said southeastern territory, complainant has used only its "Trojan" and "Eldean Patent" brands. Complainant did not learn until in 1912, shortly before the bringing of this suit, that defendant had built up and was conducting an extensive trade in a "Tea Rose" brand of flour throughout said southeastern territory.

Defendant is an Illinois corporation, owning and operating a flour mill at Germantown, Illinois. Continuously since 1893 defendant has used the words "Tea Rose" in marketing its flour sacks. Beginning in 1904 defendant conducted an active campaign to build up a large trade in its "Tea Rose" flour in said southeastern territory, with the result that when this suit was filed defendant's sales of "Tea Rose" flour in that market amounted to more than $150,000 a year. Defendant adopted "Tea Rose" as its mark in perfect good faith, with no knowledge that anyone else was using or had used those words in such a connection. In the flour trade in said southeastern territory the mark "Tea Rose" had come to mean defendant's flour, and nothing else.

If this were what is commonly known as an "unfair competition" case in distinction from a technical "trade-mark" case, complainant could not be given any relief for two reasons: (1) There is not and never has been any competition between the two flours in the same markets, hence no "unfair" competition, no palming off of defendant's flour as complainant's, no trespass committed or threatened upon complainant's good-will. And (2) if the words "Tea Rose" were open to common use, like the family name of the maker or the geographical designation of the place of manufacture or words descriptive of the grade of the goods, the make-ups of the two bags are so distinctive in color, lettering, wording, and names and addresses of makers, that, from a comparison alone, it could not be found that confusion would be likely to result. On the facts as now presented, this case therefore turns on the correctness of complainant's insistence that the words "Tea Rose" being proper for adoption as a technical trade-mark, and complainant having appropriated the mark and applied it to its flour, thereby complainant acquired the mark as its property and had the right to exclude others from using it in the flour trade throughout the territory of the United States, irrespective of the questions of how far complainant's trade, reputation, and good-will actually extended, and whether defendant had interfered or was threatening to interfere with complainant's established business.

Use of an arbitrary and distinctive mark to indicate the origin or ownership or articles of trade—the dealer's "commercial signature" —is very old. It may have begun because the general run of consumers of those ancient times could not have read the dealer's business name and address if he had written them upon his articles in the vernacular. And throughout, the question whether or not a trade-

mark is property, has often been mooted. Lord Langdale, in *Perry* v. *Truefitt*, 6 Beav. 73: "I own it does not seem to me that a man can acquire a property merely in a name or mark." Vice-Chancellor Sir W. Page Wood, in *The Collins Company* v. *Brown*, 3 K. & J. 423: "It is now a settled law that there is no property whatever in a trade-mark." Lord Herschell, in *Reddaway* v. *Benham*, A.C. (1896) 199: "I doubt myself whether it is accurate to speak of there being property in a trade-mark." On the other hand, the books are full of cases in which by implication or direct statement it is declared that trade-marks are property. But the dispute is only apparent; the minds of the various courts are found to be in accord when the basis of the cause of action and the reason for granting injunctive relief are considered.

It is evident that those who deny that trade-marks are property agree with the others that complainants are entitled to protection in the use of trade-marks. And both sides meet in finding that the cause of action is the injury done or threatened to a complainant's trade in which he has used the marks in question to designate the origin or ownership of his goods and that the appropriate relief is to enjoin the defendant from using the marks to divert trade that otherwise would have gone or would go to the complainant. Whether trade-marks are accurately called property or not, it is clear that some of the rights that are incident to property do attach to them; and therefore, just as courts sometimes state jurisdictional facts by describing corporation parties as "citizens," it may be convenient to speak of trade-marks as "property," as a short way of expressing a limited truth that requires ampler means for a complete and accurate statement. And that limited truth is as compactly defined as anywhere else in *Weston* v. *Ketcham*, 51 How. Prac. (N.Y.) 455: "There is no such thing as a trade-mark 'in gross' to use that term of analogy. It must be 'appendant' of some particular business in which it is actually used upon or in regard to specified articles."

It is not the trade-mark, but the trade, the business reputation, and good-will, that is injured; and the property or right in the trade is protected from injury by preventing a fraud-doer from stealing the complainant's trade by means of using the complainant's "commercial signature."

From these considerations of the nature of trade-marks and the basis and scope of trade-mark suits, it would follow that complainant in this case has no property in the mark "Tea Rose," like property

in its mill and wheat and flour; has no monopoly of the use of the mark, like the monopoly of a patent or a copyright; has no right at all to the mark "in gross," but a right only to the extent that the mark is "appendant" to its trade; has no basis of complaint except for injury to its business; and (since defendant has traded honestly in markets where complainant is unknown and has neither committed nor threatened an injury to complainant's reputation and good-will) has no cause of action in equity. But complainant nevertheless relies upon expressions to the effect that trade-marks are without "territorial limitation," are the exclusive property of their first adopters throughout the sovereignty within which they were anywhere applied by them to articles of commerce, and contends that the "unfair competition" cases in which the concurrent use of marks or names not susceptible of adoption as technical trade-marks was permitted, provided fraud and deception were sufficiently guarded against, have no application.

The cases indicate to us that it is true in a sense that trade-marks are without territorial limitation, but not in the sense meant by complainant. The sense we perceive is one that goes back to the foundational purpose of the trade-mark suit. Since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article.

Contrary to this view, certain cases are to be noticed. In *Derringer* v. *Plate*, 29 Cal. 292, 87 Am. Dec. 170, Derringer was a manufacturer of pistols at Philadelphia, Plate at San Francisco. This statement appears in the opinion: "The manufacturer at Philadelphia who has adopted and uses a trade-mark has the same right of property in it at New York or San Francisco that he has at his place of manufacture." Yes, if Derringer was selling his pistols in the San Francisco market or any market where Plate was trying to palm off his pistols as Derringer's; and we find nothing in the report to show that such was not the fact.

We find nothing in conscience or in reason or in persuasive precedents that should induce us to permit complainant to dominate the Southeastern markets in question, where "Tea Rose" means defendant, and thus absorb or take over the valuable trade that defendant

in good faith has built up in virgin territory. If this may be done, then the trade-mark doctrine, which started out to prevent defendants from deceiving consumers to complainants' injury, has come to protect complainants in deceiving consumers to complainants' advantage at the expense of defendants.

If the junior has not established his trade in good faith, or if, having appropriated certain markets in an honest belief, he should attempt to forestall the elder trader by hastening into markets the elder was arranging to occupy, it might be that equity would have no difficulty in recognizing an inchoate right in the elder to precedence and dominance, for honesty and fair dealing should appeal to conscience; but no such questions are here, because on the present record defendant's honesty and fairness stands unquestionable.

The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.[1]

QUESTIONS

1. Why was the plaintiff denied the relief for which it asked in this case?
2. Territorially, how far is a trader's trade name protected?
3. Suppose that the plaintiff had registered "Tea Rose" as a trade-mark in 1872, would the decision of this court have been the same?
4. P has been selling goods in Illinois under a certain trade-mark and intends shortly to extend his sales to Iowa, Wisconsin, and Minnesota. D, knowing of this, begins to sell similar goods, bearing P's mark, in Iowa. To what relief, if any, is P entitled?
5. Does the decision in the principal case give sufficient protection to the trade-mark of a growing business?

FAIRBANK COMPANY *v.* LUCKEL, KING COMPANY

102 Federal Reporter 327 (1900)

Hawley, D. J. This is a suit in equity. It was instituted to restrain the infringement of the trade-mark or trade name "Gold Dust," used to designate a washing powder manufactured and sold on the market by appellant. The alledged infringement consists of the use of the name "Gold Drop" to designate a washing powder manufactured and sold by the appellee. The circuit court held that appellant was not entitled to relief prayed for, dismissed its bill, and rendered a decree in favor of respondent (88 Federal Reporter 694), from which the present appeal is taken.

[1] Affirmed 240 U.S. 403 (1915).

It is claimed that the respondent's packages are to the eye unlike complainant's. Admit it. There are many cases where respondent's packages and labels are to the eye so distinctive and unlike the packages of complainant as not to deceive purchasers exercising ordinary care, who are accustomed to the size of the packages and the general characteristics of the labels. But how about the stranger who knows nothing about the packages or of the labels, but has read the advertisement, and remembers the name "Gold Dust"? Is it not fair to assume in a case like this that a decided majority of the purchasers would not ask for a specific size of a package with a certain designated label? Would they not call for the article by name? It must constantly be borne in mind that there are two kinds of trade-marks, one of peculiar pictures, labels, or symbols; the other in the use of a name. The infringement charged herein is in the adoption by the respondent of both the trade name and trade-mark. So far as the name "Gold Dust" is concerned, the dissimilarity of the labels, size of packages, and character of symbols can make no essential difference.

The trade name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisement of the name was for the purpose of having the intended purchaser ask for "Gold Dust" without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would not have great force. The imitation of the name "Gold Dust," by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article, except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name "Gold Drop"—"on account of its being short, good for advertising, and easy to remember."

Many precautions were taken by respondent to avoid imitating complainant's label. Is it not peculiarly significant that no efforts whatever were made in this direction with reference to the selection of a name totally dissimilar from that of "Gold Dust"? Why was "Gold Drop" selected? There were plenty of other names that were short and easy to remember. Other manufacturers of washing soap

have found no difficulty in this regard—for instance: "Pearline"; "Babbit, 1776," etc. When these facts are considered, is it not reasonably clear that in selecting "Gold Drop," which conveys to the mind so close an imitation of "Gold Dust," there was some intention or design upon complainant's advertised trade name "Gold Dust"? Was not this result accomplished whether so intended or not?

These general views bring us directly to what we conceive to be the controlling question in this case. In the light of the evidence, and of all the surrounding circumstances presented herein, are the names "Gold Dust" and "Gold Drop" so similar in sound as to deceive the unwary or mislead an unsuspecting customer to accept "Gold Drop" for "Gold Dust"? This is the test that has often been applied in cases of this character.

It may be said that if one stops to reflect upon the names "Gold Dust" and "Gold Drop," and listens to the sound, he will discover that the names are not entirely similar. A layman, as well as a lawyer or a judge, might so decide upon a careful inspection and reading of the names. But in determining that question we must put ourselves in the place of a purchaser of ordinary caution, who asks for a washing powder called "Gold Dust," and from his standpoint determine whether he would be liable to be misled or deceived by the name "Gold Drop." *Glen Cove Manufacturing Company* v. *Ludeling*, 22 Fed. 823; *N. K. Fairbank Company* v. *R. W. Bell Manufacturing Company*, 23 C.C.A. 554, 77 Fed. 869; *Manufacturing Company* v. *Simpson*, 54 Conn. 527, 545, 9 Atl. 395; *Colman* v. *Crump*, 70 N.Y. 573, 578.

The question whether complainant's trade name of the words "Gold Dust" has been appropriated by respondent's use of the words "Gold Drop," separate and distinct from the use of symbols and devices adopted by complainant, may be said to be a close one. But, after a careful examination of the numerous authorities cited by the respective counsel upon this subject, we are of opinion that it must be answered in the affirmative. It is true that in many of the cases the alleged infringer dressed the words relied upon with such accessories that made it clear that the name used might be mistaken for the complainant's words, and the courts in such cases have usually placed their conclusions upon such grounds.

The decree of the circuit court is reversed, and cause remanded, with directions to enter a decree in favor of appellant in accordance with the views expressed in this opinion.

QUESTIONS

1. Were the words "Gold Dust" a trade-mark or a trade name? Did it make any difference in this case whether they were one or the other?
2. What is the test for determining whether a trade-mark has been infringed by a competitor?
3. What is the test for determining whether a trade name has been infringed?
4. Suppose that the defendant had adopted the words "Gold Drop" in ignorance that the plaintiff was using "Gold Dust" on a similar product. To what relief, if any, would the plaintiff have been entitled?
5. (*a*) Is "Hole-Proof" for a hose infringed by "No-Hole"? (*b*) "Keep-clean" for a brush, by "Sta-clean"? (*c*) "Maizena" for a corn starch preparation, by "Maizharina"? (*d*) "Pride of Rome" for canned goods, by "Pride of Home"?
6. (*a*) Is "Sapolio" for a soap infringed by "Sapono"? (*b*) "Coca-Cola" for a beverage, by "Koke"? (*c*) "Grape-Nuts" for a breakfast food, by "Grain-Hearts"?
7. P manufactured and sold an antiseptic called "Argyrol." D, a druggist, offered to customers, calling for "Argyrol," a silver nucleinate, a similar but cheaper preparation. To what relief, if any, is P entitled?

CARROLL *v.* McILVAINE

171 Federal Reporter 125 (1909)

Bill in equity to restrain the alleged violation of the complainant's trade-mark.

The complainant is a corporation which has succeeded to and now owns a business founded in Baltimore by one Carroll in 1870. The defendant is a corporation which has succeeded to and now owns a business founded by one McIlvaine in New York in 1865. Both businesses have been continuous and that of the defendant has been well and favorably known in New York City. The complainant's business appears to have been of smaller volume, but to have been well known in Baltimore.

In 1874 the original Carroll registered as a trade-mark, under the Act of 1870, the words "Baltimore Club" in connection with the words, "Warranted Pure Rye Whiskey," declaring in his affidavit that he had used this trade-mark in connection with a "high-class article of pure rye whiskey" for more than four years. He registered the same words as a trade-mark under the Act of 1881 in the year

1881. In 1907 the present complainant registered the same words as a trade-mark.

The complainant began selling his product in New York City and asserted that the defendant was violating his trade-mark; and to substantiate this assertion, the present suit was brought.

Hough, D. J. The complainant gives undue weight to the series of registration set forth. Property right in a trade-mark exists at common law and is independent of the statutes regulating registration. Under the present trade-mark act a certificate of registration is prima facie evidence of ownership; but this evidence may be contradicted in court and the apparent right of the registering party shown not to exist. Registration cannot confer a title to a trade-mark, if some other individual has acquired a prior right by adoption and use, nor can it vest a title in the registrant as against another's common-law title. *Glen Cove Manufacturing Company* v. *Ludeling*, 22 Fed. 823; *Ohio Baking Company* v. *National Biscuit Company*, 127 Fed. 116. The fundamental inquiry therefor is: To which of the contending parties should judicial protection be granted?

To him who first did bring the article into the market and did first affix a distinguishing name or symbol should be granted protection, to the end that no other shall deceive or mislead the public and injure the first introducer by appropriating said distinguishing mark or any colorable imitation thereof. *Amoskeag Manufacturing Company* v. *Trainer*, 101 U.S. 51. The owner of a trade-mark has no estate in the trade-mark as such, nor does registration confer upon him any monopoly. His position bears no resemblance to that of a patentee. He is entitled to legal protection for his trade-mark only because by granting the same the courts protect the business designated or indicated to the public mind by the trade-mark. It is for this reason alone that, where the trade-mark is used by different persons in the same line of business and operating (partly at least) in the same territory, the exclusive use thereof is awarded to him that first devised and used the same. Upon the assumption, therefore, that the parties to this litigation are vending or trying to vend the same article in the same place under the same name, the question must be settled whether the founder of complainant's business or the founder of defendant's business first adopted and used the trade-mark "Baltimore Club" as applied to rye whiskey.

It is established by his own declaration that the original Carroll began to sell Baltimore Club whiskey not earlier than 1870, and it is

in my opinion established by the oral evidence herein that the original McIlvaine sold Baltimore Club rye whiskey and obtained a considerable market for the same as early as 1868. This finding of fact is enough to dispose of the case.

The bill is dismissed.

QUESTIONS

1. In the opinion of this court, what is the effect of registration of a mark under the Trade-Mark Act?
2. Where did Congress get the power to pass a trade-mark act? Do the various states have power to pass laws respecting trade-marks?
3. In what way or ways must a trade-mark be used before it can be registered under the Federal Act?
4. (*a*) What are the advantages of registration? (*b*) What are the disadvantages of registration?
5. Under the Act, what may be registered as trade-marks? Does the Act preclude the registration of anything which at common law could have been appropriated as a trade-mark?
6. Outline the steps necessary in securing a valid registration of a trade-mark.
7. Trace the steps by which one trader may oppose the registration of a trade-mark by another.
8. What liability for infringement of trade-marks is provided for in the Act?
9. In addition to damages, to what other relief is a registrant entitled to under the Act, for an infringement?
10. What courts have jurisdiction over cases of infringement of registered trade-marks? Is this an advantage or disadvantage to the registrant?
11. To be entitled to the benefits of the Act, must the registrant give notice of registration? How must notice be given?
12. How long is a trader entitled to protection by virtue of a registration? Is he entitled to re-register his trade-mark after the period of protection has expired?
13. May a trade-mark be sold or assigned under the provisions of the Act?
14. What is meant by the "Ten-Year Clause"? What is the purpose and scope of this clause?

2. Practices Prejudicial to the Public

RIPY & SON *v.* ART WALL PAPER MILLS

41 Oklahoma Reports 20 (1913)

Action by the Art Wall Paper Mills against J. W. Ripy & Son; judgment for plaintiff, and defendants bring error. Affirmed.

Brewer, C. The Art Wall Paper Mills, a corporation of Dallas, Texas, brought this suit in the district court against J. W. Ripy & Son, a copartnership, to recover the purchase price of certain goods, wares, and merchandise, sold and delivered in pursuance of a certain written contract executed by the parties. We will hereafter refer to the parties as they were called in the trial court. The case was tried by a jury, and a verdict returned in favor of the plaintiff. The defendants, plaintiffs in error here, bring up the case on case made, and in their brief seem to rely upon the following alleged errors: First, overruling defendants' demurrer to the petition. Second, placing the burden of proof upon the defendants. Third, the exclusion of evidence offered by defendants.

The defendants claim that plaintiff's petition is demurrable for the reason that the suit is based upon a certain written contract or trade agreement attached to and made a part of the petition, and which it is alleged shows upon its face that it is an agreement in restraint of trade and commerce and is therefore void; and, that being void, the plaintiff cannot recover for the goods sold and delivered in pursuance of its terms. The portion of the agreement which it is claimed has the foregoing effect is a provision inserted in it requiring the defendants to handle only the wall papers manufactured and kept for sale by plaintiff during the life of the contract, which was from April 5 to January 5 following. In other words, that the defendants agreed that from the limited period of time named in the contract they would buy all their wall papers from the plaintiff. We do not believe that this agreement has the effect contended for. It is not pointed out, and from a reading of the contract we do not believe it can be pointed out, wherein this contract has the effect of restraining trade, or competition in trade, so as to bring it within the denunciation of the law. The plaintiff is a wholesale dealer in wall paper, and had traveling salesmen in Oklahoma and Indian Territory at the time this contract was made in 1904. The defendants are retail dealers in Oklahoma City. In return for defendants' agreement that for a certain period of time they would buy their wall paper

exclusively from plaintiff, and would keep in stock a complete line of the same, the reciprocal agreement was made by plaintiff that its traveling salesmen in the two territories named would send their "stock fill in orders" to be filled from defendants' stock, and for which sales they received the profits. If plaintiff was going to give defendants the benefit of certain sales made by its traveling salesmen from samples of its line of papers in stock, it certainly was not unreasonable to require defendants to carry, for the time being, only its line of papers. It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties, rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are not competitors, nor does the contract affect the competitors of defendants, nor can we see wherein it could injuriously affect the public. We think these views find ample support in the authorities.

An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade. *Threlkeld* v. *Steward*, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888; *Trentman* v. *Wahrenburg et al.*, 30 Ind. App. 304, 65 N.E. 1057; *Brown* v. *Rounsavell*, 78 Ill. 589; *Live Stock Ass'n* v. *Levey*, 54 N.Y. Super Ct. 32; *Diamond Match Company* v. *Roeber*, 106 N.Y. 473, 13 N.E. 419, 60 Am. Rep. 464; *Olmstead* v. *Distilling E.C.F. Co.*, 77 Fed. 265; *Arnold Bros.* v. *Kreutzer & Wasem*, 67 Iowa, 214; *Kronschnabel-Smith Company* v. *Kronschnabel*, 87 Minn. 230, 91 N.W. 892.

A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of the trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce. This view is fully sustained by the Supreme Court of the United States in various decisions.

In *Whitwell* v. *Continental Tobacco Company*, 125 Fed. 454, 60 C.C.A. 29, 64 L.R.A. 689, JUDGE SANBORN, after discussing contracts

and agreements which would constitute a combination or conspiracy, in restraint of trade, adds:

"If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who made and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation."

The jury passed on the evidence, and its verdict was approved by the trial court. To our minds the verdict was right.

QUESTIONS

1. What was the object sought by the contract under consideration in this case? Was the object legitimate? What were the means used to attain this object? Were the means used unreasonable?
2. Suppose that the contract had provided that the defendant should handle only the goods of the plaintiff for a period of fifty years, would the court have reached the same conclusion?
3. Suppose that the contract had provided that the defendant should handle only the goods of the plaintiff for five years wherever he might carry on his retail business, would the court have reached the same conclusion?
4. P agrees to buy goods from D for a period of one year. D in turn agrees to sell goods to P and not to sell the same goods to any other person in the same locality during the term of the contract. P sues D for breach of the agreement, alleging that D is selling the same kind of goods to a competitor in the town where he carries on business. D pleads the invalidity of the agreement. What decision?
5. D enters into a contract with P to buy goods from the latter for his retail store for a period of one year. In the same contract he agrees that for a period of five years, he will not sell the goods of any competitor of P in the locality where he, D, carries on his business. P sues D for breach of this agreement, alleging that within the five years D has sold goods of a competitor of P in the locality in question. D pleads that the contract is illegal. What decision?
6. The D Railway Company for a sufficient consideration agrees to furnish P with refrigerating cars to haul fresh fruit from X to Y and further agrees that during the life of the contract it will not furnish cars to any competitor of P. This is an action by P against D for breach of the agreement. What decision?

FISHER FLOURING MILLS COMPANY *v.* SWANSON

76 Washington Reports 649 (1913)

ELLIS, J. In this action, the plaintiff seeks to enjoin the defendant from selling flour manufactured by the plaintiff at less than the retail price fixed by the plaintiff in a contract of sale made with the defendant, and to recover damages in the sum of $1,000. The complaint alleges, in substance, that the plaintiff is a Washington corporation, with its principal place of business at Seattle where it has erected a large manufacturing plant and installed special machinery for manufacturing a special brand of flour known as "Fisher's Blend of Patent Flour"; that the cost of manufacturing this flour is greater than that of ordinary flour; that the plaintiff has widely, and at great expense, advertised this flour as a blended flour, pure, wholesome, and of unusual excellence, and has used certain copyrighted designs and the above trade name to acquaint the public with the flour, so that it has become widely known as of unusual excellence and as of higher price than ordinary patent flour, and that large quantities of it are sold in Seattle and King counties; that it is necessary to operate the mill to its full capacity in order to continue the business at a profit; that the flour is sold in all of its markets in constant and keen competition with many other brands of patent flour of all qualities, that it is necessary to sell the flour through all retail dealers in each community rather than through one or two, as may be profitably done with ordinary patent flours, so that the good-will of the retail dealers is necessary to the success of the company; that in order to keep this good-will, it is necessary to maintain a minimum retail price offering a reasonable profit to the retailer; that if the uniform minimum price is not maintained, the reputation of the flour will be injured, the good-will of the dealers lost and the plaintiff will be prevented from operating its mill at a profit; that the defendant conducts a retail grocery store in Seattle, and on or about October 3, 1911, entered into an oral contract with the plaintiff, agreeing to purchase from the plaintiff a carload of this flour at the uniform wholesale price, and further agreeing not to sell the flour at less than a certain minimum retail price; that these prices were the same as the wholesale and retail prices maintained by the plaintiff and its other customers, and permit no more than a reasonable profit; that, according to the contract, the plaintiff delivered an instalment of

the flour on this purchase, the defendant accepting therewith a written invoice containing the following stipulations:

> Retail prices. Our flour is sold on condition, which is made a part of the consideration of the sale of said goods, that the purchaser, if he retails the same, will maintain our fixed minimum retail selling prices, and if he wholesales them, they are sold subject to the same conditions. Nothing in the above conditions shall prevent the purchaser from fixing the selling price in excess of the above lists when cost of transportation or other local conditions necessitate the same.

That, since the delivery of the flour to the defendant, he has violated the agreement by selling the flour at less than the agreed price, and has widely advertised such sales, which price is less than the general retail price of all the other patent flours so sold in Seattle and the state of Washington; that his purpose in so doing is to attract customers to his store; and that he has threatened to continue this practice; that the defendant's action in this respect is causing damage to the plaintiff by injuring the reputation of the flour with the public and destroying its sale to retailers in Seattle and throughout the state; that by reason of defendant's action, other retailers are threatening to follow his example which will curtail the sales of flour and cause irreparable damage to the plaintiff; that it has already decreased the sales of the flour, by rendering it unpopular with the retailers, to the plaintiff's damage in the sum of $1,000; that the plaintiff has no adequate remedy at law. The defendant demurred to the complaint on the ground that it does not state a cause of action, and that the court has no jurisdiction of the subject-matter. The demurrer was sustained, and the plaintiff electing to stand upon its complaint, the action was dismissed. The plaintiff appeals.

A single question is presented. Has a manufacturer who has given a reputation to particular goods which he creates, the right to fix in his contract of sale to retailers a reasonable minimum price at which those goods shall be sold to consumers?

It may be premised as a postulate that a manufacturer who has imparted a reputation to his goods may lawfully employ any means to secure the legitimate benefits of that reputation not inhibited by statutory enactment or inimical to a sound public policy.

It is not claimed, on the one hand, that the contract in question is inhibited by any statute of this state. No question of interstate commerce is involved. We are, therefore, not here concerned with the Sherman Anti-Trust Act. Nor is it claimed, on the other hand,

that the fact that the article sold was under a trade name or in a trade dress, or the fact that it was manufactured by a patented process, affords the contract any immunity from invalidity which it would not otherwise possess. These things must be regarded as immaterial to this discussion. No question of public corporations is involved. What we shall say has no application to contracts of corporations charged with public functions or duties as such.

The question is thus reduced to the inquiry whether, at common law, the contract here involved is violative of any canon of public policy. In considering this question, much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between those contracts which, since the earliest history of the law on the subject have been designated as "contracts in restraint of trade," and those more correctly designated as "contracts in restraint of competition." The term "contracts in restraint of trade" has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established. Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely stated, such contracts, when without limit as to time or place, are invalid. *Long* v. *Towl*, 42 Mo. 545, 97 Am. Dec. 355.

The broader doctrine inhibiting, as contrary to public policy, all contracts which, by any other means tend unreasonably to restrict competition is of much more recent development, and is much less thoroughly settled. This doctrine has to do with the rules of public policy relating to control of markets. See note to *Harding* v. *American Glucose Company*, (Ill.) 74 Am. St. 238, 239; Noyes, *Intercorporate Relations*, section 336; 2 Eddy, *Combination*, sections 719, 722; Cooke, *Combinations, Monopolies and Labor Unions* (2d ed.), section 160. This broader doctrine is primarily directed against monopoly in any form, and seeks to protect the public interest by holding invalid all contracts by which monopoly of a given market may be either created or sustained, or, as such, made profitable to its beneficiaries, where the right to make them is not incidental to a legal monopoly such as is accorded by the patent laws. With these last, we are not here concerned. It is manifest that, in case of such contracts, the public interest is not conserved by mere limitations either as to time or

space. The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. Noyes, *Intercorporate Relations* (2d ed.), section 357.

Since limitations of time and space do not serve as the test of the validity of contracts in restraint of competition, the tests must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency it is not. In applying this test, the public interest is always the first and controlling consideration. A contract or combination creating a general, that is to say, complete, restraint or restriction, however slight, within a given market, is essentially invalid because it must either result from, or tend to produce, a monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition, every general restriction, that is, every restriction covering all or a controlling fraction of a given commodity, is essentially unreasonable. It is not fairly necessary to the protection of the manufacturer. Having a monopoly, he needs no protection. It is not in any sense beneficial to the public, because it does not tend to create an incentive to increased excellence of product in order to maintain the better price, but, because of the monopoly, has a contrary effect.

And again, when the contract fixing the price is not ancillary to some main lawful contract, the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its reasonableness in other particulars. In such a case, there is no main lawful purpose to subserve which partial restraint is permissible, hence nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid. *United States* v. *Addyston Pipe and Steel Company,* 85 Fed. 271; *State* v. *Duluth Board of Trade*, 107 Minn. 506, 121 N.W. 395, 23 L.R.A. (N.S.) 1260.

But it does not follow that every contract restraining competition as to an insignificant part of the total of a given commodity, in a given market, in any degree is obnoxious to public policy. At common law, contracts containing limited restrictions on competition as incidental to some main contract, and not entered into for the sole purpose of

suppressing competition or controlling the market, are not always and necessarily invalid. 2 Eddy, *Combinations*, section 723.

Partial restrictions have been held valid where the restraint was in different particulars. For example: The contract may limit the vendee's right of sale to a certain territory—a restriction as to place. *Phillips* v. *Iola Portland Cement Company*, 125 Fed. 593. It may provide that the vendee deal exclusively with the vendor and only in articles of the vendor's manufacture—a restriction as to person. *Brown* v. *Rounsavell*, 78 Ill. 589; *Wood Mowing and Reaping Company* v. *Greenwood Hardware Company*, 75 S.C. 378, 55 S.E. 973, 9 L.R.A. (N.S.) 501; *Ferris* v. *American Brewing Company*, 155 Ind. 539, 58 N.E. 701, 52 L.R.A. 305; *Butterick Publishing Company* v. *Fisher*, 203 Mass. 122, 89 N.E. 189, 133 Am. St. 283. Again, the restriction may be as to the price which the retailer must charge for goods purchased from the manufacturer—the case here involved. *Elliman and Sons* v. *Carrington and Son*, L.R. 1901, 2 Ch. Div. 275; *Walsh* v. *Dwight*, 40 App. Div. 513, 58 N.Y. Supp. 81; *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, 27 L.R.A. (N.S.) 395; *Commonwealth* v. *Grinstead*, 111 Ky. 203, 63 S.W. 427, 56 L.R.A. 709.

The foregoing authorities make it clear that the courts now generally recognize, as the basis of the rule of public policy against restraints on competition, the tendency to create a monopoly. It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order to injuriously affect the public, but, unless it be held that every restriction is per se illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. If, considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation

to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public.

The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare must be considered, and that, of all circumstances, the dominant consideration is the welfare of the public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy.

Measured by our definition, which, as it seems to us, is as stringent as any fair construction of the authorities will sustain, the facts and circumstances as alleged in the complaint disclose no sinister purpose in the contract pleaded, nor any tendency inimical to the public interest. It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected, just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer, who has no monopoly or approximation thereto, void. If a controlling number of manufacturers or wholesale dealers in a given commodity should make identical contracts with the retailers of that locality, it would doubtless be the result of an agreement, secret or otherwise, between them, and all such contracts would be invalid as in aid of a combination in restraint of competition. The coincidence would be almost

conclusive evidence of the illegal combination, and sufficient basis for declaring all of the contracts void. No such condition, however, is presented by the record before us.

Such a contract as that here in question is of interest to the public only where the whole of a given commodity, or a measurable approximation to the whole of that commodity, is in the control of one of the contracting parties, or of some combination of which he is a member or which dictates his policy. It is monopoly, either actual or approximate, hence potential, against which the public interest is arrayed, not a fair reward to individual effort and initiative, which is as essential to competition as a competitive price. In the absence of a monopoly, either actual or potential, as defined above, a contract fixing retail prices cannot have an effect appreciably inimical to the public interest, because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in the production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit, or he must retire from business, and this, for the simple reason that, in the absence of a monopoly, either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition.

Under our present competitive system, the public is as vitally interested in the maintenance of competition in the excellence of the product as it is in competition in prices. The one is as essential to value received at any price as the other is to a reasonable price for any value. Lacking either, the public will eventually be the loser, either in quality of product or in enhancement of price, which comes to the same thing. No sound public policy will insist upon the complete sacrifice of competition in one of these elements to competition in the other. A monopoly, however, either complete or approximate, tends to the destruction of both, hence, is on all scores, against public policy. But where a given product is not in the hands of one man or a combination of men, there is no monopoly, either actual or proximate, and the public has no interest hostile to a contract by a single manufacturer among many, intended and reasonably calculated to

enable him to maintain an unusual standard of excellence in that part of the aggregate of the given product which he puts out. On the contrary, the public interest, so far as it is touched by the contract, is in sympathy with it, because served by it.

Applying the principles which we have developed from the cases, it seems clear that this contract is valid. The facts alleged negative the idea of any existing monopoly in the appellant, and the contract has no tendency to create one. The retail selling price was fixed merely as ancillary to the contract of sale to respondent. The fixing of the price was reasonably necessary to protect the appellant, and reasonable as applied to the public, in that it provides only for a fair profit. Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant to compete with other high-grade flours while maintaining the excellence of its product.

In *Walsh* v. *Dwight*, *supra*, the New York Supreme Court, touching a contract closely analogous to that here involved, said:

> It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendant would have the right to establish agencies for the sale of their goods, or to employ others to sell them at such prices as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendees, in selling at retail, should charge a specified price for the goods sold or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his business, such an agreement is not illegal, as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturers of other articles from selling their products to any one who is willing to buy.

In *Commonwealth* v. *Grinstead*, *supra*, notwithstanding the existence of a statute expressly prohibiting any person, firm, or corporation doing business in Kentucky from entering into any pool, trust, combine, agreement, confederation, or understanding with any other person, firm, or corporation for the purpose of regulating, controlling, or fixing prices, the court upheld the plan of fixing minimum retail prices of certain brands of goods of established reputation by contract between the manufacturer and retailer, on the ground that

there was no concerted action among the manufacturers, since the price was fixed by each manufacturer on his own product only.

The respondent relies solely upon the following decisions: *Park & Sons Company* v. *Hartman*, 153 Fed. 24; *Bobbs-Merrill Company* v. *Strauss*, 210 U.S. 339; and *Dr. Miles Medical Company* v. *Park & Sons Company*, 220 U.S. 373, affirming the decision of the circuit court of appeals in 164 Fed. 803. The decision in *Park & Sons Company* v. *Hartman* is not necessarily in antagonism to the views here expressed. That case involved a monopoly. It holds that there is no such analogy between the statutory monopoly accorded by the patent laws and the monopoly resulting from the sole possession of a trade secret as to make it lawful to protect the latter by contracts or notices fixing the retail price, as is permitted in the case of patented articles. The opinion is devoted largely to a demonstration of the proposition, which we deem unquestionably sound, that the owner of a secret formula for the manufacture of a proprietary medicine, though he may protect the secret by contract against its disclosures, cannot protect the profits resulting from his monopoly in the manufactured article (in that case, Peruna), by contracts or notices fixing a minimum price at which the jobbers and retailers shall sell it. That the effect of the contracts there involved was an absolute prevention of any competition in prices, a complete or general restriction as to Peruna, because of their application to the whole supply of that article on the market, is shown by the opinion where it is said:

> Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of "Peruna." There are no others. If there were, there would not be a complete or general restraint for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected.

That the learned judge who wrote the opinion recognized the validity of such contracts as between the acutal contracting parties, where no monopoly is involved, and when merely ancillary to some main contract, and reasonably necessary to the protection of the

retained business of the covenantee, is also evident from the following language which further distinguishes that case from the one before us:

> Looking to the averments of the bill as a whole and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again; any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complainant their prime purpose is neither the protection to the retained business of the complainant, nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business.

The opinion, when fully considered, fairly recognizes every principle hereinbefore developed from the authorities as sustaining the contract here involved.

In *Bobbs-Merrill Company* v. *Straus*, it was held that the sole right to vend a copyrighted book secured by the United States statute to the owner of the copyright does not include the right to impose by a mere notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. The distinction from the case in hand is too plain to require further comment.

Nor do we deem the decision of the United States Supreme Court in *Dr. Miles Medical Company* v. *Park & Sons Company*, controlling on the facts here presented. In that case, the bill alleged the manufacture of certain proprietary medicines under secret formulas and processes, and the sale thereof under trade-marks and trade dress; that to prevent injury to its business by the sale of its medicines at cut prices, complainant had adopted a dual system of contracts controlling the sale and resale of its product; that the system contemplated consignments to wholesale dealers, permitting them to sell only to

other contracting wholesale dealers and retail dealers who had also contracted with the complainant to sell its goods at fixed prices; that the defendant, refusing to enter into a consignment contract had induced complainant's wholesale and retail agents, by means of fraudulent representations, to violate their contracts and sell goods of complainant's manufacture to the defendant, with the intention of selling such goods at cut rates to attract customers for other merchandise. An injunction against this practice was sought. It appeared that consignment contracts had been made with over four hundred jobbers and wholesalers, and retail agency contracts with twenty-five thousand retail dealers in the United States. The court refused relief on the ground that, by its system of interlocking restrictions, complainant sought to control not only the prices at which its agents might sell its product, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus fix the amount which the consumer shall pay, eliminating all competition. The court held that such a system amounts to a restraint of trade and is invalid both at common law and under the Sherman Anti-Trust Act. It will be noted that the system there involved had no purpose save to create and perpetuate a monopoly which, under any view of the authorities, is invalid. While certain expressions in the opinion might appear contrary to the views we have expressed, the opinion expressly states that the mere fact that some restraint results does not necessarily render the contract invalid, and clearly recognizes the principles upon which the contract here involved must be held valid. Mr. Justice Hughes, speaking for the court, uses the following language:

With respect to contracts in restraint of trade, the earlier doctrine to the common law has been substantially modified in the adaptation to modern conditions, but the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs* v. *Baltimore Gas Company*, 130 U.S. page 409, "The decision in *Mitchel* v. *Reynolds*, 1 P. Wms. 181; S. C. Smith's *Leading Cases*, 407, 7th Eng. ed.: 8th Amer. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society different from those which now prevail, the rule laid down is not

regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *Leather Cloth Co.* v. *Lorsont*, L. R. 9. Eq. 345."

The cases upon which the respondent relies are all reviewed and distinguished from a case such as that here presented, in *Ghiradelli* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

We do not hold that a mere notice printed on the packages or bill of lading, in the absence of express contract to be bound by such notice, would be sufficient to create a valid restriction of the sale price, however unobjectionable. We do not hold that a manufacturer would have the right by any such notice to pursue his product into the hands of third parties and fix their selling price. The right where it can be exercised at all, rests in contract, and it would seem that the contract should only be held binding upon the parties to it, except where the breaking of the contract is induced by the fraud of the third party. As observed in *Dr. Miles Medical Company* v. *Park & Sons Company*, *supra:* "Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon inherent power incident to production and original ownership, but upon agreement."

Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price-cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high-grade flour is a very different thing from fixing the price on one brand of high-grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened

competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement. *Mazetti* v. *Armour & Company*, 75 Wash. 622, 135 Pac. 633. His reputation as a manufacturer, one of his chief assets, is bound up in them.

The attitude of the respondent, who has wilfully violated his contract, presents no equities in his favor. The allegations of the complaint show that the public interest will in nowise suffer from an enforcement of the contract. As between the parties, the appellant is entitled to relief for which he prays.

The judgment is reversed.

QUESTIONS

1. What persons or classes of persons are likely to be prejudicially affected by the operation of a contract like that in the principal case?
2. What interest does a manufacturer allege he is seeking to protect by price-maintenance contracts?
3. Is the manufacturer's alleged interest real or fanciful? Is it worthy of the protection of the law?
4. Is it likely that the manufacturer's interest will be injured by price-cutting on the part of retailers?
5. A manufacturer appoints agents in all large cities to sell flour for him and instructs them that they must not sell below certain minimum prices. Is there anything illegal about this agreement? May the manufacturer recover damages from the agent for disobedience?
6. In a recent case the Federal Trade Commission held illegal a contract, by which the manufacturer imposed minimum retail prices on jobbers, on the ground that such a contract was unfair to three classes of persons: first, to the relatively lower cost and more efficient jobbers competing or attempting to compete with the relatively higher cost and less efficient jobbers; second, to non-price-maintaining manufacturers competing or attempting to compete with the manufacturer setting the minimum price; third, to consumers and the public generally.
   a) What is the essence of the unfairness in each case?
   b) Might not the same objections be urged against the validity of the contract in the principal case?
   c) Admitting the likelihood of the injurious consequences relied upon by the Trade Commission, does it necessarily follow that the contract is invalid?

7. Can the principal case be distinguished from the *Miles Case*, 220 U.S. 373, cited in the opinion?
8. Can it be reconciled with the case of *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, cited in the opinion?

SWIGERT *v.* TILDEN

121 Iowa Reports 650 (1903)

Bishop, C. J. It will be observed that, by the contract in question, defendant agreed, without limitation of time, to abstain from engaging in the shirt business within a radius of one hundred miles of Des Moines; that, as related to the states of Iowa and Nebraska generally, the agreement provides for a time limit of ten years. Taking the facts as stated in the petition to be true—and, as far as well pleaded, the demurrer admits the truth thereof—it is manifest that the alleged conduct on the part of the defendant does now, and, unless he be restrained therefrom, will continue to interfere with, and work injury and damage to, the property rights and business interests of plaintiffs. It is certain that the defendant possessed valuable rights, and, without dispute, these were in the nature and character of property rights. It was in consideration of a transfer of such to plaintiffs that they entered into the contract of purchase, and paid the consideration price. It would seem that common fairness requires that plaintiffs should be protected in the rights thus acquired by them, unless, forsooth, some consideration of general public policy dictates that their complaint should go unheard. That the attempted restriction is against public policy, and therefore void, is the sole contention on behalf of appellee. It is said that the contract, having application to the entire states of Iowa and Nebraska, is one in general restraint of trade; that the one-hundred-mile restriction is a limitation in pretense only, while covering practically the entire state; and that the same cannot be upheld, because the contract being indivisible, if one part is void all parts are void.

The doctrine that contracts in general restraint of trade are to be held void as against public policy found root early in the development of our system of law, and recognition of such doctrine has continued down to the present time, but with more or less of modification as different courts have been called upon to make practical application thereof. Formerly, in the enforcement of this doctrine, the rights of the immediate parties to a contract, as between themselves,

were put entirely out of view until it had been determined that the contract was not one, the enforcement of which would operate as an encroachment upon the interests of the general public. The reason of the rule is said to be twofold—that such restraints work injury to the public by depriving it of the industry of the restricted party in the vocation for which he is best adapted, as well as by the tendency thereof to throw the person so restricted upon the public for support, or compel him to expatriate himself and transfer his residence and allegiance to some other state or country in order to pursue his occupation; also that the tendency of such restraint is to foster monopolies, prevent competition, enhance prices; and might ultimately enable organized capital to silence all competition, become the sole producer, and place the public at its mercy. The following cases will serve to illustrate: *Alger* v. *Thatcher*, 19 Pick. 51 (31 Amer. Dec. 119); *Wright* v. *Ryder*, 36 Cal. 342 (95 Amer. Dec. 186); *Western W. Ass'n* v. *Starkey*, 84 Mich. 76 (47 N.W. Rep. 604, 11 L.R.A. 503, 22 Amer. St. Rep. 686); 1 Smith's *Leading Cases* (9th ed.) 694. In view, however, of the ever-changing conditions of trade, commerce, the mechanic arts, etc., and the diversity of interests which obtain in the various states and countries, it must be manifest that there can be no single standard respecting public policy. This is true to the extent that it frequently happens that in certain respects the policy of one state is found to be the exact opposite of that maintained by another; and, even where there is no essential difference in the matter of abstract definition, it may be certain that self-interest, viewed from the standpoint of locality more or less immediate, will enter into and dominate the side of practical application. Now, in this country we have no such conditions as existed when the doctrine was first promulgated. In a recent case it has been well said:

Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an everyday occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this

common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of some particular state. There is no expatriation in moving from one state to another, and from such removals a state would be likely to gain as much as it would lose.

Herreschoff v. *Boutineau* (R.I.), 19 Atl. Rep. 712 (8 L.R.A. 469, 3 Amer. St. Rep. 85).

Again, in *Wood* v. *Whitehead*, 165 N.Y. 545 (59 N.E. Rep. 357), it is said:

The doctrine which avoids a contract for being one in restraint of trade is founded upon a public policy. It had its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was more or less necessary to material well-being and welfare of his community and of the state. The conditions which made so rigid a doctrine reasonable no longer exist. In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that in some way the public interests were endangered.

See, also, *Diamond Match Company* v. *Roeber*, 106 N.Y. 473 (13 N.E. Rep. 419, 60 A, St. Rep. 464); *Leslie* v. *Lorillard*, 110 N.Y. 519 (18 N.E. Rep. 363 1. L.R.A. 456).

To anyone at all familiar with present-day conditions, it requires no argument to demonstrate that public policy requires that in trade matters there shall be no restraints imposed, save in those instances where it is clearly made to appear that the public welfare would be otherwise seriously endangered. And an all-important factor in business life is the right of individual contract—the right to buy and sell, to bargain and convey at will. The demand for recognition of this, coming up from the world of business, has been heard, and countenance given thereto, by legislatures and courts everywhere. So, too, note has been taken of the baneful results which follow, seemingly with inevitable certainty, from giving sanction even negatively, to acts or conduct involving fraud or dominated by bad faith. Certainly it is not going too far to say that there can be no sound public policy which operates to give countenance to the open disregard and violation of personal contracts entered into in good faith and upon good consideration. A recent expression of

the English Court of Appeals on the subject rings true. In *Underwood* v. *Barber*, 68 L.J. Ch. Div. 201, it is said:

> If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is *prima facie* at all events, contrary to the interests of any and every country.

In giving application to the present-day doctrine, it has been said that the true test is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. And the restriction must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may, in reason, expect to flow from the restrictive features of the contract. In *Hubbard* v. *Miller*, 27 Mich. 15 (15 Amer. Rep. 153), it is said:

> If considered with reference to the situation, business, and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid.

And this language is quoted approvingly in *Hedge* v. *Lowe, supra.* Now whether a contract is reasonable in respect of the length of time during which the restriction is to run, and in respect of the scope of territory which is to be covered thereby, as applied to a case like the one before us, it would seem that the fair and full protection of business and good-will which the vendee has purchased and paid for may well be accepted as the test. Certainly the restriction ought not to be wider in the scope of its operation, and there can be no good reason for confining it to any narrower limits. It follows naturally that each case must be governed in the main by its own facts. Take, for instance, the case of *Hedge* v. *Lowe.* There it appeared that Lowe had sold his stock of goods at Winterset to Hedge, and, in connection therewith, had agreed that he would not engage in the same business at Winterset or vicinity for a period of five years. There was no suggestion that the restriction as to time or territory was unreasonable, and such could not have been well urged, in view of the fact that the business was carried on at

retail, and, of necessity, confined to the town where located and its vicinity, and five years was not thought an unreasonable time in which to enable the purchaser to convert the good-will of the vendor into good-will personal to himself. But manifestly there are trades and employments which, from their nature, cannot be and are not confined to local limits. The business of a wholesale merchant in the city of Des Moines will serve to illustrate. His trade extends over the state as a whole, and mayhap into adjoining states. It certainly cannot be said that the good-will of his business is limited to the city of Des Moines. On the contrary, it must be apparent that it extends as far as his trade extends. Now, there is no basis upon which to draw a distinction between the enforcement of the property right in the good-will of a retail business at Winterset and the enforcement of the property right in the good-will of a wholesale business at Des Moines, as the same actually exists. Nor are we persuaded that the welfare of the state is jeopardized in the one case more than in the other. The expatriation of the one is no different in character from that of the other and the one is no more likely to become an idler or pauper than the other. Indeed, as we read the cases, the courts no longer attempt to fix geographical limits within which only contracts of the character in question can be enforced. And if such they ever had, the terms "general restraint of trade" and "partial restraint of trade" have no longer a territorial meaning. We think the subject may be disposed of by saying that in respect of time and territory, and in the absence of any affirmative showing that the public welfare is put in jeopardy, as that a monopoly is created, or the like, the validity of all such contracts must be made to depend upon the question, as presented by each case, whether the restraint goes so far only as to reasonably insure to the purchaser the full enjoyment of the right purchased by him in good faith and for a good and valuable consideration. This view finds support in many of the reported cases. Among others, the following may be referred to. *Cowan* v. *Fairbrother*, 118 N.C. 406 (24 S.E. Rep. 212, 32 L.R.A. 829, 54 Amer. St. Rep. 733); *Oregon Navigation Co.* v. *Winsor*, 20 Wall. 64; *Nordenfelt* v. *Maxim*, 63 L.J. Ch. Div. 908; *Smalley* v. *Greene*, 52 Iowa 241; *Troendle* v. *Bender* (Iowa), 79 N.W. Rep. 1123. We are aware that there are cases in which a contrary doctrine is announced. We have examined all those cited by counsel for appellee, and others as well, and we find nothing to disturb the conclusion as expressed above.

It follows from what we have said that, as matter of law, at least, the contract involved in this action cannot be held to be void as in general restraint of trade. The good-will sold extended over the territory covered by the contract, and in the absence of any showing, the time limit, as applied to the states of Iowa and Nebraska, cannot be said to be unreasonable. Even though the time limit as applied to the city of Des Moines and vicinity, may be said to be unreasonable, we cannot agree that this avoids the contract in its entirety; and, as the petition states a cause of action, the demurrer should have been overruled.

Reversed.

QUESTIONS

1. What was the object sought by the contract under consideration in this case? Is this object worthy of protection?
2. It was said in one case that such a contract is objectionable, because (*a*) it tends to deprive one of the parties of his means of livelihood; (*b*) it tends to injure society through decreased production; (*c*) it tends to foster and develop monopolies. Are these tendencies real or fanciful? If real, are they sufficiently serious to justify a court in ruling that such a contract is prima facie void?
3. Assuming that the tendencies mentioned in the foregoing question are real, can you still support the conclusion of the court in the principal case?
4. D for several years owned and operated a small drug-store on 55th Street. He sold the store to P and convenanted that he would not re-enter the drug business for a period of twenty-five years. About three years later he opened a drug-store just across the street from P's store. P sues D for damages. D pleads that the contract is void. What decision?
5. Suppose that D had convenanted that he would not re-enter the drug business anywhere in the city of Chicago? anywhere in Hyde Park? anywhere on 55th Street? anywhere within one-half mile of the store he had sold? What would be the decision of the court under each hypothesis in an action by P against D for a breach of the agreement?
6. D for many years had been engaged in the business of manufacturing and selling matches. His market extended to practically every state in the Union. He sold his business to P and covenanted that he would not re-enter the match business anywhere in the United States for a period of twenty-five years. Later he begins the manufacture and sale of matches in the state of Nevada, where neither he nor P had previously sold any matches. P sues D for breach of the covenant. What decision?

7. D sells his drug-store to P and covenants that he will not re-engage in the drug business in the same block as long as he shall live. P sues D for breach of the agreement. What decision?
8. For many years D had owned and operated a large grocery store in X, a town of about 5,000 people. He sold the business to P and covenanted that he would not re-enter the grocery business in X for a period of ten years. At the end of five years, P closed up his grocery business and retired. D immediately opened a new grocery store in the town of X. P sues D for a breach of the covenant. What decision?

CUMMINGS *v.* UNION BLUE STONE COMPANY

164 New York Reports 401 (1900)

Appeal from judgments of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 30, 1897, and July 8, 1898, affirming judgment in favor of defendants entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

LANDON, J. The trial court, in directing a verdict for the defendants, held that the contract, for the alleged violation of which by the defendants the plaintiff sought to recover damages, was a combination to control the market of blue stone and the market price, and to increase the market price and maintain it at the increased price, and was, therefore void.

The evidence was to the effect that in 1887 the plaintiff and fourteen other persons were the producers of nearly the whole product of Hudson River blue stone, and of at least 90 per cent of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi River; that their yearly sales amounted to upwards of $1,500,000; that owing to competition among themselves their profits had for some time been practically nominal; that with the intent to increase their profits, and to secure to each of said producers such part of the sales as his usual production bore to the whole production, they entered into an agreement bearing date the twenty-first day of February, 1887, with the defendant, the Union Blue Stone Company, and thereby agreed that the said company should act as their sales agent of all the marketable blue stone, manufactured and unmanufactured, which the market would take for the six years from that date at prices to be fixed by the Blue Stone

Association, composed of the said producers, and to apportion the sales among the producers according to a schedule set forth in the contract, and to sell for no other parties, the producers agreeing to sell no other stone except through such agent, and, acting as the Blue Stone Association, to fix the prices, and each to furnish, upon the request of the sales agent, his quota of stone as apportioned. This contract was observed by the parties for about three years. The prices were increased, the sales aggregated about $1,500,000 per year, and the plaintiff's share of the profits was satisfactory to him. By the end of the three years, competition in other kinds of stone and in artificial stone had so far developed as to threaten, in the opinion of the greater part of the producers, not including the plaintiff, further successful operation under the contract, and they resolved to discontinue operations under it, with the result to the plaintiff that he took no further benefit under it. The plaintiff, meantime, had assigned his interest under the contract and certain blue stone and other property to the defendants Sweeney in consideration of their payment to him of 10 per cent of their gross amount of sales under the contract. The plaintiff charges that the blue stone company and his assignees, the Sweeneys, combined together to prevent any further delivery and sales upon his account under the contract, and thus deprived him of any further profit.

The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts do anything to injure what he sells. (*Diamond Match Company* v. *Roeber*, 106 N.Y. 473; *Leslie* v. *Lorillard*, 110 N.Y. 519; *Tode* v. *Gross*, 127 N.Y. 480; *Hodge* v. *Sloan*, 107 N.Y. 244.) It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel anyone to continue a business which he can sell, or

finds it to his interest to abandon; much less to continue it for any time or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations; all are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them are contrary to sound public policy and are void. (*People* v. *Sheldon*, 139 N.Y. 251; *People* v. *Milk Exchange*, 145 N.Y. 267; *Judd* v. *Harrington*, 139 N.Y. 105; *Leonard* v. *Poole*, 114 N.Y. 371; *Arnot* v. *Pittston & Elmira Coal Company*, 68 N.Y. 558; *Stanton* v. *Allen*, 5 Denio, 434; *Hooker* v. *Vandewater*, 4 Denio, 349; *People* v. *Fisher*, 14 Wend. 9.)

It is urged that the rule is only applicable to articles of prime necessity. Case of criminal conspiracies to commit any act injurious to trade or commerce (Penal Code, sec. 168; 2 R.S. 692, sec. 8, sub. 6) have been more frequent in commodities of prime necessity such as grain, meat, salt, milk, coal, and the like, probably because such offenses are more flagrant and were punishable at the common law. We are not now reviewing a conviction for crime and need not inquire whether in any criminal element the case differs from *People* v. *Sheldon*, *supra*. The subject-matter of the contract before us is a useful commodity of a nature to be needful for any purposes. Without considering the question whether there are many articles of commerce which are in no proper sense necessaries or even conveniences, but mere luxuries or appendages of vanity, a monopoly in which does not conflict with the spirit of any statute or with the sound public policy which the statute cited declares, it is clear that the blue stone in question is not within any of such classes. It is abundant

in the foothills of the Catskill Mountains and not found of equal quality elsewhere. When this contract was made there were many small producers who supplied it to these parties, but were themselves without means or facilities to reach the New York market. The stone had been for many years and still is in use for sidewalks, crossings, curbings, and gutters in the eastern and southern cities of the United States, and in the construction of bridges, fountains, basins, floors and for trimmings in the exterior walls of buildings and for various other purposes. Its fitness and serviceability for these purposes were shown, and the evidence also tended to show that in these respects it has no superior in the New York market. In a civil action prime necessity need not be shown. The parties to this contract controlled 90 per cent of a total product of about $2,000,000 in value, marketed in New York City. Other kinds of stone were in competition with it, but it is plain that the customer who preferred this stone would be restricted in his reasonable rights, if constrained by a monopoly to pay an exorbitant price for it, or to accept another kind which he did not want.

The uncontradicted evidence left it clear that this contract was void for the reasons stated, and the trial court was right in so holding as a matter of law. The trial court was also right in holding that the plaintiff had made no proof of his special charge against these defendants of a fraudulent breach of the contract as to his alleged interest in it.

The judgments should be affirmed, with separate bills of costs.

QUESTIONS

1. What was the object sought in the principal case? Is this object legitimate and worthy of the protection of law?
2. Suppose it could have been shown in the principal case that not only was the market better supplied with the commodity in question but also at lower prices, would the decision have been the same?
3. Certain competing manufacturers agree to divide the market, for their common commodity, territorially among themselves. They further agree that no one of them shall sell or offer to sell the commodity in the market of another of them. Is this agreement enforcible? What is the object sought in this agreement?
4. Certain competing manufacturers form a protective association. It is agreed between them that they will curtail production 10 per cent in case the market price of the commodity falls x amount, 20 per cent in case the market price falls y amount, and 40 per cent in case the market price

falls *z* amount. It is further agreed that in case any member of the association violates the agreement that the offending member shall pay to the association, for distribution among the remaining members of the organization, 5 per cent of the market value of the surplus he manufactures over and above what he is entitled to manufacture under their agreement. This is an action by the association against one of its members claiming a certain sum due because of a violation of the agreement in question. What decision?

5. The competition between rival manufacturers of a certain commodity has become so keen that all are facing financial ruin. They meet and organize a protective association. It is mutually agreed by and between them that they will not sell the commodity in question, in the regular course of business, for less than actual cost, plus 1 per cent profit, which it is admitted is not an unreasonable profit for the particular business. It is further agreed that in case any member does sell the commodity, in the regular course of business, below the price agreed upon, he shall pay to the association, by way of liquidated damage, 1 per cent of the gross receipts of the sales so made. Is this agreement enforcible?

3. Legislative Regulation of Market Practices

STANDARD OIL COMPANY *v.* UNITED STATES

221 United States Reports 1 (1910)

WHITE, C. J. We quote the text of the first and second sections of the act, as follows:

SECTION 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every

contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States* v. *Freight Association*, 166 U.S. 290, and *United States* v. *Joint Traffic Association*, 171 U.S. 505. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of

the parties to the association or combinations in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion, that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon, it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial interpretation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning, it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for as established by all of the numerous decisions of this court which

have applied and enforced the Anti-Trust Act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the Act were in every case interpreted. Indeed intermediate the decision of the two cases, that is, after the decision in the *Freight Association Case* and before the decision in the *Joint Traffic Case*, the case of *Hopkins* v. *United States*, 171 United States 578, was decided, the opinion being delivered by JUSTICE PECKHAM, who wrote both the opinions in the *Freight Association* and the *Joint Traffic Cases*. And, referring in the *Hopkins Case* to the broad claim made as to the rule of interpretation announced in the *Freight Association Case*, it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the *Joint Traffic Case* this statement was expressly reiterated and approved and illustrated by examples; like limitation on general language used in *Freight Association* and *Joint Traffic Cases* is also the clear result of *Bement* v. *National Harrow Company*, 186 U.S. 70, 92, and especially of *Cincinnati Packet Company* v. *Bay*, 200 U.S. 179.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect result of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

QUESTIONS

1. What transactions are prohibited by the so-called Sherman Anti-Trust Law? What construction has been placed upon these prohibitions by

the Supreme Court of the United States? Is this construction justified by the words of the Law?

2. What penalties and remedies are provided for violations of the Law? What remedial weaknesses appeared in the enforcement of the Law?
3. D manufactures certain medicines under a secret formula. He sells them to wholesalers under a contract by which the wholesalers agree that they will not sell the medicines to retailers who practice "price-cutting." Is D punishable under the Sherman Law?
4. D places on the market a mimeographing machine on which he holds or controls certain patents. He sells a machine to X and in the contract of sale it is provided that P must use in connection with the machine only the stencils and inks made and sold by D. Is D punishable under the Sherman Law for entering into "a contract in restraint of trade"?
5. What is meant by a "corner" in the market? What is the object sought in securing or striving for a corner in a commodity? Is the object worthy of protection by law? Was a corner a crime at common law? Is a corner, or an attempt to secure a corner, a punishable offense under the Sherman Law?
6. D and others, manufacturers of a commodity for which there is a national market, organize and divide the national market among themselves territorially. It is agreed that no one of them shall sell the commodity in the market allotted to another during the term of the contract. They allege that the purpose of the agreement is to eliminate waste which inevitably results from bitter competition and offer evidence tending to show that the price for the commodity wherever sold is reasonable. Are D and the others punishable under the Sherman Law?
7. Various associations of retail dealers sent out to all their various members a list of wholesalers who were selling direct to consumers. The object of the publication of this list was to prevent, as far as possible, further dealings by retailers with those wholesalers who were entering into the field of retail trade. Are these associations punishable under the Sherman Law?

UNITED STATES *v.* UNITED SHOE MACHINERY COMPANY

234 Federal Reporter 127 (1916)

In Equity. Suit by the United States against the United Shoe Machinery Company and others. On motion to dismiss. Denied.

Trieber, D. J. Section 3 of the Clayton Act,[1] which was invoked as the basis for this action is as follows:

Section 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for

[1] Portions of the Clayton Act relating to market practices will be found on p. 627, Appendix C.

sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefore, or discount therefrom, or rebate upon such price, on the condition, agreement or understanding, that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Is section 3 of the Clayton Act, so far as it applies to leases, unconstitutional? Counsel for defendants challenge the constitutionality of so much of section 3 of the Clayton Act as applies to leases. It has been earnestly and ably argued that a lease is no more commerce than insurance or manufacturing, and it is claimed, if not commerce, it cannot be interstate commerce. The diligence of the able counsel has not been rewarded by finding any authority which has determined that question, nor has the court been able to find any. In the argument many extreme illustrations were made. It is a well-settled rule that courts are slow to declare the acts of co-ordinate departments of the government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States the courts will uphold it.

It may be conceded that every lease is not commerce, but that is not conclusive that none may be. Each case must be determined from the peculiar facts shown to exist in that case. When a corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels, instead of selling them, why is it not as much engaged in commerce as if it sold them outright? But, aside from that, cannot a person be engaged in interstate commerce, although, if his business is confined exclusively to his own state, he would not be engaged in commerce?

It is not necessary to cite the many authorities found in the books sustaining this conclusion, as they will be found collated in the opinions hereinbefore cited. It is sufficient to say that as new methods of transacting business are devised, if they are found to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the

one hand, and the person who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one state to another, it is interstate commerce, and therefore, subject to be regulated by Congress under the commerce clause of the Constitution.

Do the allegations in the complaint show a violation of section 3 of the Clayton Act? The Act declares unlawful any lease, etc., where the price is fixed, or a discount or rebate upon such price is granted, under the condition, agreement, or understanding that the lessee or purchaser thereof is not to use or deal in the goods, etc., of a competitor of the lessor or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition, or tend to create a monopoly in any line of commerce.

A careful reading of this section of the Act leaves no room for doubt as to what Congress intended. The language is plain, and the court is unable to find any ambiguity in it, which would make it necessary to resort for aid in its construction, to any source outside the Act itself. In plain and concise language it declares that it shall be unlawful for any person engaged in interstate commerce to lease, sell, or contract for sale of any commodity, whether patented or not, for use, consumption, or resale, and fix a price for, a discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee shall not purchase such articles from the competitors of the lessor or the seller, and then is added: "*If the effect of such an agreement, or understanding, may be to lessen competition, or tend to create a monopoly.*"

That the leases made by the defendants, as shown by the extracts attached to the complaint as exhibits, provide for rebates on condition that the lessee shall only use the machines and materials manufactured and dealt in by the defendants, and forbids the use of machines purchased from other manufacturers, under penalty of having the leases cancelled and machines taken from them by defendants, is beyond question. But it is claimed that there is nothing in the leases whereby the lessees covenant or bind themselves not to use any machines manufactured by other parties, or purchase materials which are dealt in by the defendants, from others. This is true, but as the lessors retained the right, in case any other machines are used in the manufacture of shoes than those manufactured by the defendants,

of cancelling the leases and removing the leased machines, and further provide for a rebate to those who comply with these terms, which those using other machines or material do not receive, there is an implied promise on the part of the lessees not to violate these conditions of the leases, or suffer the penalty set out in the leases.

Can there be any doubt that these clauses in the leases are understood by the lessees to mean that by using no other machines than those of the defendants they are relieved of certain royalties, otherwise exacted for the use of the defendants' machines? And can there be any doubt but that, if the lessees use the defendants' lasting machines for shoes welted on machines made by other manufacturers, or fail to use exclusively defendants' machines for lasting shoes, or fail to purchase from the defendants exclusively all duplicate parts, extras, and devices of every kind, needed or used in operating, repairing, or renewing the lasting machinery, or fail to use exclusively the auxiliary machinery of the lessor in the manufacture or preparation of insoles licensed under letters patent No. 849,245, or fail to buy any additional machines needed in their shoe factory, which can be leased from the lessor, that under the terms of the leases set out in the Exhibits 1, 2, 3, 4, 5, and 6, all of the leases can be cancelled and the lessees be deprived of the use of them and be compelled to pay certain royalties, which otherwise they would not have to pay? Exhibit 9 expressly authorizes the lessor to terminate all leases for these breaches, although the lessees are bound by them for seventeen years from the date of the lease, whether the patents, if there be any, have expired or are still in force.

Can it be doubted that these provisions are not only within the spirit but the letter of the statute? What is the natural, direct, and necessary effect of these conditions? There can be but one answer to this: To compel the lessees to use defendants' machinery, regardless of whether the terms granted by the defendants are as favorable as can be obtained from other manufacturers of some of the machines or dealers in some of the materials.

In addition, it is charged that by reason of these leases there is no market for anyone inclined to manufacture these or some of these machines, and therefore all are deterred from engaging in their manufacture, as, there being no market for them, financial failure is bound to result from the attempt. Such a condition of affairs clearly tends to substantially lessen competition and create, in favor of the defendants, a monopoly in that line of commerce.

Motion to dismiss overruled.

QUESTIONS

1. Would the contract under consideration in the principal case have been enforcible under the common law? Would the defendants have been punishable under the Sherman Anti-Trust Law?
2. What constitutional objection was urged against the validity of the Law? How did the court dispose of this objection?
3. Why was the enactment of the Clayton Act necessary or desirable? What is its relation to the Sherman Anti-Trust Law? What is its relation to the law creating the Federal Trade Commission?
4. It is said that one of the purposes of Congress in the enactment of the Clayton Law was to furnish an injured competitor with more effective remedies than he had under the Sherman Law. In what respects is the legal position of the injured competitor improved by the Clayton Act?
5. What specific market practices are declared unfair and prohibited by the Clayton Act?
6. D is a manufacturer of a breakfast cereal which he markets under a trade-mark. He requests retailers, with whom he deals, not to sell it under a certain stated price. P disregards the request of D, and D refuses thereafter to fill P's orders for the cereal. (*a*) Is D punishable under the Sherman Law? (*b*) Is D's conduct a violation of the Clayton Act?

SEARS, ROEBUCK & COMPANY *v.* FEDERAL TRADE COMMISSION

258 Federal Reporter 307 (1919)

Original petition by Sears, Roebuck & Co. against the Federal Trade Commission, to review an order commanding petitioner to desist from certain unfair methods of competition in commerce. Commission directed to modify its orders and petition in other respects denied.

BAKER, Cir. J. This is an original petition to review an order entered by the respondent, the Federal Trade Commission, against the petitioner, Sears, Roebuck & Co., a corporation, commanding the petitioner to desist from certain unfair methods of competition in commerce. Respondent's order was based on its complaint, filed on February 26, 1918, on the petitioner's answer, and on a written stipulation of facts. Procedure before the commission and also before this court on review is prescribed in section 5 of the act to create a Federal Trade Commission, approved on September 26,

1914 (38 Stat. 719, c. 311).[1] Respondent's authority over the subject-matter of its order is derived from the following provision in the same section: "Unfair methods of competition in commerce are hereby declared unlawful." Section 4 (Comp. St. sect. 8836d) is a dictionary of terms used in the act. "Commerce" means interstate or foreign commerce; but the general term, "unfair methods of competition," is nowhere defined specifically, nor is there a schedule of methods that shall be deemed unfair.

In its complaint respondent averred that petitioner is engaged in interstate and foreign commerce, conducting a "mail-order" business; that petitioner for more than two years past has practiced unfair methods of competition in commerce by false and misleading advertisements and acts, designed to injure and discredit its competitors and to deceive the general public, in the following ways:

1. By advertising that petitioner, because of large purchases of sugar and quick disposal of stock, is able to sell sugar at a price lower than others offering sugar for sale.

2. By advertising that petitioner is selling its sugar at a price much lower than that of its competitors and thereby imputing to its competitors the purpose of charging more than a fair price for their sugar.

3. By selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give petitioner a profit on the transaction, without letting the customer know the facts.

4. By advertising that the quality of merchandise sold by its competitors is inferior to that of similar merchandise sold by petitioner, and that petitioner buys certain of its merchandise in markets not accessible to its competitors, and is therefore able to give better advantages in quality and price than those offered by its competitors.

Petitioner extensively circulated the following advertisements, among others:

"We can afford to give this guaranty of a 'less than wholesale price' because we are among the largest distributors of sugar, wholesale or retail, in the world. We sell every year thirty-five million pounds of sugar. And, buying in such vast quantities, and buying directly from refineries, we naturally get our sugar for less money than other dealers."

[1] Portions of the act creating the Federal Trade Commission and defining its powers will be found on p. 629, Appendix D.

"For instance, every grocer carries granulated sugar in stock, but does he tell you which kind? There are two kinds—granulated cane sugar and granulated beet sugar—and they look exactly alike. Some people prefer the one and some the other. But beet sugar usually costs less than cane sugar, so if you are getting beet sugar you should pay less for it. Do you know which kind you are getting and which you are paying for?"

"Our teas have a pronounced, yet delicate tea flavor with an appealing fragrance because we spare neither time nor expense to get the very best the greatest tea gardens of the world can produce."

"First, because of the difficulty of getting in this country the exact character and flavor of certain teas, we do our own importing and critically test every tea. Our representative goes to the various tea-growing countries and makes the selection in person. Then, the greatest care is taken to get only first-crop pickings from upland soil."

"Also, by buying direct from tea gardens, while the crops are being harvested, we are able to have them always perfectly fresh."

"It would be natural for you to conclude that all this care in buying and selecting would make our teas very high in price, but in reality, our prices are unusually low for such high quality. Here is a reason: By buying direct from the tea gardens we cut out the middleman's profits."

"Over land and sea, from the greatest coffee regions in the world we bring you the choicest of the crop, and make it possible for you to have that fresh, savory, and fragrantly tempting cup of coffee for your breakfast. You see, we buy direct from the best plantations in the world. We get the pick of the crop—upland coffees from rich, healthy soil and growers of unquestioned experience and skill. We buy enormous quantities and pay cash, thus making it possible to offer our customers the very best coffees at very low prices."

Petitioner's sales of sugar during the second half of 1915 amounted to $780,000 on which it lost $196,000. Petitioner used sugar as a "leader" ("You save 2 to 4 cents on every pound"), offering a limited amount at the losing price in connection with a required purchase of other commodities at prices high enough to afford petitioner a satisfactory profit on the transaction as a whole, without letting the customer know that the sugar was being sold on any other basis than that of the other commodities. Petitioner obtained its sugar in the open market from refiners and wholesalers. Competitors got their sugar from the same sources, of the same quality, and at the same

price. Sugar is a staple in the market. Price concessions upon large purchases are unobtainable. From the facts respecting petitioner's methods of advertising and buying and selling sugar respondent found, and properly so, in our judgment, that petitioner intentionally injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and the other commodities which petitioner was offering in connection with sugar.

Petitioner purchased 75 per cent of its teas from wholesalers and importers in the United States. The remainder it purchased through its representative, Peterson, in Japan; but there was no proof that Peterson was qualified to make "selections in person" of "first-crop pickings from upland soil." All of petitioner's coffees were purchased from wholesalers and importers in the United States. Respondent found that petitioner's advertisements of teas and coffees were false and designed to deceive the public and injure competitors.

By the order, issued on June 24, 1918, petitioner was commanded to desist from:

1. Circulating throughout the states and territories of the United States and the District of Columbia catalogues containing advertisements offering for sale sugar, wherein it is falsely represented to its customers, or prospective customers of said defendant or to customers of competitors, or to the public generally, or leads them to believe, that because of large purchasing power and quick-moving stock, defendant is able to sell sugar at a price lower than its competitors.

2. Selling, or offering to sell, sugar below cost through catalogues circulated throughout the states and territories of the United States and the District of Columbia among its customers, prospective customers and customers of its competitors.

3. Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers and customers of its competitors, catalogues containing advertisements representing that defendant's competitors do not deal justly, fairly and honestly with their customers.

4. Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its teas, in which said advertisements it falsely stated that the defendant sends a special representative to Japan who personally goes into the tea gardens of said country and personally supervises the picking of such teas.

5. Circulating through the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its coffees, in which it falsely stated that the defendant purchases all of its coffees direct from the best plantations in the world.

Petitioner insists that the injunctional order was improvidently issued, because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. For example, no sugar offers of the character assailed were made after August, 1917. But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices.

Petitioner urges that the declaration of section 5 must be held void for indefiniteness unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression "unfair methods of competition" is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concession" or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the

statutes were enacted. Why? Because the general ideas of "dishonesty" and "fraud" are so well, widely, and uniformly understood that the general terms "rebate or concessions" and "schemes to defraud" are sufficiently accurate measures of conduct.

On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the government as *parens patriae*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kind hereinbefore recited are expected by Congress to control. This prima facie reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the commission and the court to a prescribed list of specific acts. *Cong. Rec.* 63d Cong. 2d Session, pp. 13, 18, 533, 12, 246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914 (38 Stat. 731, c. 323), condemning certain specific acts.

But such a construction of section 5, according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. *Buttfield* v. *Stranahan*, 192 U.S. 470; *Union Bridge Co.* v. *United States*, 204 U.S. 365.

With the increasing complexity of human activities, many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition

by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embraced in a judgment or decree of a court and enforcible by execution or other writ of the court.

In the second paragraph of the order, petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it "by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation."

Sufficient appears in this record and in the representation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the times in question, and that the action of the commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past.

Respondent is directed to modify its order as stated above; and in other respects the petition is denied.

QUESTIONS

1. What protection, if any, did competitors at common law have against such practices as were complained of in the principal case?
2. What is the organization of the Federal Trade Commission? Over what matters does the Commission have jurisdiction? Under what constitutional authority did Congress create the Federal Trade Commission?
3. Why was the creation of the Federal Trade Commission necessary or desirable? In the regulation of trade practices, could not the courts have performed the functions which the Commission was created to perform?

4. Classify and discuss briefly the powers which the Commission enjoys in performing its duties.
5. To what extent are the findings and orders of the Commission final?
6. What standards does the Commission enforce in determining the fairness or unfairness of competitive practices? Can the Commission declare unfair and illegal practices which were not unfair and illegal under the common law?
7. D, a manufacturer of flour, engaged in interstate commerce, sells his product to retailers under contracts by which retailers agree not to resell the flour in the regular course of business below a certain minimum price. What decision in proceedings against D by the Federal Trade Commission?
8. D, a manufacturer of stoves, engaged in interstate commerce, appoints X as an exclusive agent to sell the stoves in the town of Z and refuses to sell his stoves to Y, a competitor of X. What decision in proceedings by the Commission against D?
9. D, a manufacturer of wall paper, enters into a contract with X, a retailer in the town of Z, by which X agrees to handle in his business only the wall paper of D and not to handle the wall paper of any competitor of D. P, a competing manufacturer of wall paper, complains of the conduct of D. What decision in proceedings against D by the Federal Trade Commission?
10. Examine the statutes of some state in which you are interested and see to what extent, if any, administrative machinery has been set up for regulating trade practices.

LAW AND FINANCE

CHAPTER I

INTRODUCTORY TOPICS

A

One of the most important and difficult groups of problems which a business man typically encounters, arises in connection with the administration of his finances. Whether he is starting a new business, extending an old business, or simply carrying on an established business in a normal way, he cannot escape financial problems of one kind or another and of greater or lesser importance. This business necessity demands the collection and study of certain rules of law which deal with these problems and which indicate certain solutions and aids to solutions.

In the administration of his finances, the business man will be confronted with at least three types of questions, in answering which the study of these selected portions of the law will assist him: (1) questions relating to the financial policies which he will adopt; (2) questions relating to the devices which the law has developed to facilitate the raising of money and the extension of credit; and (3) questions relating to the remedial rights of creditors.

In this part of our study, the student's main task will be two-fold: (*a*) to examine the nature and characteristics of the devices of which the business man may avail himself as aids in financial administration; (*b*) to consider the rights and remedies of creditors. The solution of problems involving questions of financial policy will to some extent depend upon the answers found in questions of types (*a*) and (*b*). But in this connection we are interested in problems of financial policy only incidentally and only in so far as the choice of such policies turns upon legal considerations.

Two kinds of devices are furnished by the law to the business man as aids in financial administration. On the one hand, there are those devices which enable him to pledge his credit in forms which give the creditor claims which have some value in exchange, such as notes, bonds, bills of exchange, and checks. On the other hand, there are those devices which enable the debtor the better to secure the creditor by putting into the creditor's hands means of enforcing the debtor's obligation other than the simple means of actions at law. Examples

of this latter sort of device are liens, assignments, pledges, and mortgages.

The fundamental object of the development of both kinds of devices has been to make available the credit of individuals for the economic advantage of society. This fundamental object is intended to be served, and is served, by the furnishing of the latter sort of devices for the protection of the creditor. As a general rule, a person is not willing to become a creditor unless the risk of loss is greatly reduced. The risk of loss to the creditor is reduced by the use of the additional devices for security. That is, the law gives these aids to the creditor primarily to aid the debtor in getting credit; and this is done, not to benefit the debtor as an individual, but for the purpose of benefiting the business community at large by giving to the credit of the individual some exchange value.

Since these devices are furnished by law, they may be used only after the proper preliminary steps have been taken in each case. When the business man does make use of any of them, he sets in motion trains of important legal consequences. Specifically, it is the preliminary steps requisite to the use of these devices and the legal consequences of their use, which we purpose to study.

One of the important legal consequences of the use of these devices is the legal relation of debtor and creditor. In this relation, certain legal obligations are imposed upon the debtor and certain rights and powers are accorded the creditor. The relation may be complicated by the fact that more than one legal device has been used in the same transaction—one for the purpose of binding the debtor and one for securing the creditor. In either event, there is a large body of law pertaining to the obligations and privileges of debtors and to the rights and powers of creditors. It is, therefore, imperative that, in addition to studying the devices available for securing credit and the legal consequences of their use, some consideration be given to the rights and powers of creditors and to the obligations and privileges of debtors.

B

One of the most pressing and, frequently, one of the most puzzling problems with which a business man is confronted is, what means are available by which he can get goods, money, or credit with which to meet the needs of his business? The means most easily available and most useful will not be the same in all cases. For example, a newly established business may find it necessary or expedient to make use of devices very different in character from those

which will serve the purpose of a well-known and well-established business. The essence of the problem is, of course, to discover means by which the would-be debtor may furnish to the prospective creditor sufficient assurance of the former's willingness and ability to meet the obligation when it is due, so that the prospective creditor's risk of loss may be reduced to a minimum.

The creditor, about to extend credit, is concerned with the ability of the debtor to pay and his willingness to pay. Of these, the more important is the debtor's ability; for, given the ability of the debtor to meet his obligation, the debt may generally be collected, whether the debtor is willing or unwilling; and again, the failure to pay does not ordinarily result from unwillingness but from inability. In other words, if the debtor has sufficient resources, legal machinery for enforcing payment is neither wanting nor difficult to set in motion. What the creditor primarily wants is assurance that the debtor has available resources out of which the creditor will be able to get his money.

The debtor can furnish a large measure of assurance of his ability to pay by an exposition of the condition of his financial affairs. This he may do by submitting to the creditor a financial statement of his business, consisting typically of a comparison of the values of his accounts receivable and of his other business assets with the value of his business obligations or liabilities. The creditor, for additional assurance, may require that this financial statement be certified by a public accountant as to the correctness of the accounts and the fairness of the estimates of value. This statement may also include a transcript, or even the original, of the debtor's book accounts. If the prospective creditor is satisfied by the statement that the business of the debtor is financially sound, he may require nothing more than the mere promise of the debtor, oral or written, to discharge the obligation at the time and in the manner agreed upon.

In many cases, however, the creditor, for one reason or another, will not be satisfied with the mere assurance of the financial soundness of the debtor's business and the simple promise of the debtor to pay, and will demand further assurance or security. In such cases, the debtor must adopt some other means of securing the creditor. He may propose to the creditor: "I will have the money to pay by the time I shall need the goods; if you will hold them for me until that time, I will pay you then." If the creditor consents to this arrangement, the goods now legally belong to the debtor, with a right in the creditor to retain possession of the goods until he is paid. This right

is known as an unpaid seller's lien. It is created by law in favor of a seller of goods or one who performs services on goods at the request of another. It is a right to the specific goods until the goods themselves, or the services expended upon the goods, are paid for. It gives to the creditor a power to subject those specific goods to the payment or discharge of the specific obligation.

The lien described above endures only while the creditor retains physical possession of the goods. Instead of retaining the goods in his physical possession, the creditor may deliver them to a carrier to be transported to a point where they are wanted by the debtor; and the creditor may further extend his control over them by taking a bill of lading for the goods in his own name so that they can be lawfully delivered only upon his order; or he may take the bill of lading in the name of the debtor and retain possession of it; or he may send the bill of lading to his own agent at the point of delivery with instructions to deliver the bill of lading to the debtor only upon receipt of the price of the goods. The same object may be accomplished by the use of warehouse receipts used in similar ways. It should be noted that the lien, the bill of lading, and the warehouse receipt, when utilized in this manner, are not, strictly speaking, devices by which the debtor gets credit for the price of the goods; for no reliance is placed in the debtor at all beyond the reliance that he will take and pay for the goods at the appointed place and time. The debtor's ability to pay in the future is not trusted at all, for he can get the goods only upon payment of the purchase price. These devices are used by the creditor so that he will not be under the necessity of parting with his goods until he has his money. At the same time, they are advantageous to the debtor in that the use of these devices or any one of them assures him that the goods will be available to him when he is ready to pay for them.

These devices are likely to be quite unsatisfactory to the prospective purchaser, for in many cases he may desire possession of the goods and an opportunity to dispose of them before he is called upon to pay for them. Since the seller's lien, the bill of lading, and the warehouse receipt, when used as outlined above, prevent the purchaser from getting immediate control over the goods, he must resort to other devices for securing the creditor if he wishes possession before payment.

Another device that suggests itself to one who wishes to secure credit or goods, without being required to pay for them immediately,

is the pledge. The person desiring to make use of this device simply delivers to his creditor personal property of one kind or another to secure the discharge of the obligation at the time and in the manner agreed upon. The legal effect of the transaction is to give to the creditor a power to sell the property so deposited and to reimburse himself from the proceeds of the sale. This device for securing the creditor is very useful because of the simplicity of its use and because of the ease with which the debtor can subject the pledged property to the payment of the debt.

A device somewhat similar in nature and effect to the pledge is the mortgage. Omitting any attempt here to discuss the technical aspects and requirements of a mortgage transaction, it is sufficient to say that it is a transaction which gives to the creditor, in the event that the debtor fails to pay the debt when due, a power to take the mortgaged property, to sell it, and to satisfy his claim out of the proceeds; and which requires him to return the remainder of the proceeds of the sale, if any, to the debtor. Either real or personal property may be mortgaged; only personal property may be pledged.

In many cases, of course, the debtor cannot avail himself of the pledge or mortgage device. He may not have property which he can conveniently pledge or mortgage; or it may be that such property as he has is not acceptable to the creditor either in pledge or in mortgage. In such cases, the debtor's search for devices of security must be carried still farther. His own credit having failed to satisfy the prospective creditor, he may be able to utilize the credit of some third person. S, for instance, may be willing to pledge his own credit that D, the debtor, will perform his obligations. He may propose to the prospective creditor: "Furnish D with goods on credit or such money as he needs; if he does not pay when he promises to pay, I will." If this proposal is acceptable to the creditor, D will get his goods or the money, as the case may be, not on his own credit but upon the credit of S. This device is called *suretyship* or *guaranty*. The legal considerations governing its use are so important that the device merits detailed treatment in a later connection.

This device may, like the others, fail the debtor in his time of need. The debtor may be unable to find any person who is willing to guarantee the payment of the debt or any person, willing to guarantee it, who is acceptable to the creditor. The creditor may be suspicious of the technicalities and intricacies of the device and refuse to accept anyone as a surety.

The foregoing are typical of the devices by which a person may secure the money or credit he needs in his business. They are useful to the debtor because they enable him to secure money and credit as he needs it; they are useful to the creditor because they are guaranties to him against the unwillingness and inability of the debtor to pay when he should; they are useful to our economic society because they make possible the creation of credit on a large scale which is so necessary to society's commercial operations.

C

Whether consciously or unconsciously, most of our legal institutions and legal devices have come into existence in response to social and economic needs. The origin and development of the devices for raising and securing credit are no exception to this general rule. These devices have gradually developed in response to certain demands of a business and industrial society, among others: that the creation and transfer of credit shall be simple processes; that the risk of loss in these processes shall be reduced to a minimum; that adequate remedies shall exist by which creditors shall be assured of the collection of their claims; and that there shall be safe means of paying existing obligations.

In the study of the credit devices, necessarily most of our attention will be devoted to the legal implications arising out of their use. But the student should not forget their functional use. He should keep constantly in mind the qualities and characteristics of these devices which make them useful to the business community in the creation and transfer of credit.

What technical and formal requirements must be observed in the utilization of the various credit devices? Do these requirements unnecessarily impede them in the performance of their functions? What justification is there for the formal requirements in each case? To what extent do these devices possess the quality of transferability? Does each device possess this quality in a sufficiently high degree to perform the functions which it is supposed to perform? Why do some of the devices possess a higher degree of transferability than others? What characteristics do they possess which aid in reducing the risk of loss in the creation and transfer of credit? What remedies are available in connection with each which facilitate the extension of credit? These are typical of the questions which the student should keep in mind in studying the functional aspects of the various credit devices.

CHAPTER II

LEGAL DEVICES FOR SECURING MONEY AND CREDIT

1. Bills, Notes, and Checks[1]

a) *Historical Statement*

A

It has been pointed out in another connection that one of the prime needs of a business or industrial community is that the creation and transfer of credit shall be simple processes. These processes must not be burdened with technical and formal requirements which will impede them in the performance of their important functions. The common law developed no credit devices which possessed this quality of simplicity in any high degree.

At an early time in our common law there developed the bond-obligation or debt under seal. This obligation arose from a formal, ceremonious transaction, by which one person promised in writing to pay money or to perform some other act at a future time. With this device credit could be raised, but the device was entirely too cumbersome and too formal in its creation for frequent and common use. Furthermore, no one but the promisee named in the document could claim any rights under it. It therefore lacked as well in the quality of transferability.

Later, under the common law there developed the obligation of debt. This obligation arose from transactions by which one person promised a *sum certain* of money, at some future time, in exchange for present goods, money, services, or use and occupation of land. Still later, there developed the simple executory contract. These transactions gave rise to what is commonly called a simple chose-in-action—a claim coupled with a legal power to convert it into money by an action at law.

The chose-in-action arising from debt and the simple executory contract provided reasonably efficient modes for raising credit but

[1] In connection with the study of cases on bills, notes, and checks, the student should consult the Uniform Negotiable Instruments Law, Appendix E, *infra*, p. 632.

lacked in the quality of transferability. Suppose, for instance, that D owes C $1,000 due at a future time. In this event, C has a claim against D, for $1,000. An element of this claim is a legal power which enables C through the judicial machinery to convert the claim, after it has matured, into money. But suppose further that C, although he has no fear that D will fail to pay at the stipulated time, is in such circumstances that it is inconvenient for him to wait until the day in question for his money. He has an unmatured claim against D, and he wishes to realize on it immediately. The scheme that naturally suggests itself to him is to sell the claim against D to X, thus realizing on his claim and at the same time leaving unchanged the amount and date of maturity of D's obligation. Under the early common law, for reasons sufficient to the early judges, such a sale was impossible. In the course of time, however, and doubtless due to the pressure brought to bear upon them by creditors, the common-law courts permitted a sale or an *assignment* of a chose-in-action on the theory that the assignment gave the buyer an irrevocable power of attorney to collect the claim in the name of the creditor. This transaction now accomplished the purpose of transferring the claim from C to X and is still available as a mode of transferring credit. But this transfer or assignment of credit is attended by certain serious inconveniences: the assignee, if action on the claim is necessary for its collection, must sue in the name of the assignor, unless permitted by statute to sue in his own name; X, in taking the assignment, takes it subject to most defenses which D would have had against C, for the general rule is that the assignee of a chose-in-action gets no larger claim than the assignor has; and, finally, X must give notice to D of the assignment in order to protect himself against a subsequent assignment and payment to some other person, or against payment by D to C.

The inadequacies of the common law modes of creating and transferring credit did not inconvenience those who engaged only infrequently in credit transactions; but to the rising merchant class in early modern England they were serious obstacles to the transaction of credit business. As a result of these inconveniences and inadequacies, the traders and business men of the time were driven to invent or discover other and more efficient credit devices. In response to this demand of the merchant class evolved a group of rules, worked out by the merchants of Europe to suit their own peculiar needs, which came to be known as the *Lex Mercatoria* or *Law Merchant*.

In the first stage of development, the law merchant was a body of special rules, for special people, enforced in special, mercantile courts. Gradually, as the merchant class increased and as credit transactions began to be engaged in by large numbers of persons who were not, strictly speaking, merchants and traders, the common-law courts were forced to recognize this new body of jurisprudence. In time, the mercantile courts began to fall into disuse and the courts of common law to enforce their rules, not as a part of the law of the land, but as special customs of the merchants. Finally, the common-law courts took over the law merchant, with certain modifications, and made it a part of the common law.

The principles and customs of the law merchant, governing the making, transfer, effect, and extinguishment of bills of exchange, promissory notes, and other credit devices, has come to be known as the Law of Negotiable Instruments, and it is this portion of the law which is the subject-matter for study in the present chapter.

B[1]

It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form a part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell,

[1] From the opinion of Cockburn, C. J., *Goodwin* v. *Robarts*, L. R. 10 Exchequer Cases, 337 (1875).

in *Brandao* v. *Barnett*, 12 Cl. & F. at page 805, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize."

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and still later and but slowly, into England. We find it stated in a law tract, by Mr. MacLeod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. MacLeod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, chapter 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that the use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin* v. *Boure*, Cro. Jac. 6, in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances, to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on

Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary, cited by Mons. Nonguier, in his work *Des Lettres de change*, had assigned to it a later date, namely 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on *Bills* (8th ed.), page 10.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement had once become established, the practice of making promissory notes payable to order and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of *Shelden* v. *Hentley*, 2 Show. 160, an action was brought on a note under seal by which the defendant promised to pay to bearer £100, and it was objected that the note was void because not made payable to a specific person. But it was said by the court, "*Traditio facit chartam loqui*, and by the delivery he [the maker] expounds the persons before meant; as when a merchant promises to pay to *the bearer* of the note, anyone that brings the note shall be paid." JONES, J., said that "it was the custom of merchants that made that good." In *Bromage* v. *Lloyd*, 2 Lutw. 1582, the plaintiff declared upon the custom of merchants in London, on a note for money payable on demand, and recovered; and TREBY, C. J., said that

bills of exchange were originally between foreigners and merchants trading with the English; afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not, and, therefore, the plaintiff need not allege any

custom, for now those bills were of that general use that upon an *indebitatus* assumpsit they may be given in evidence upon the trial.

To which Powell, J., added, "On *indebitatus* assumpsit for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received."

In *Williams* v. *Williams*, Carth. 269, where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the Court would take notice of it ex officio; and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person *secundum usum et consuetudinem mercatorum*, drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders and others, of treating promissory notes whether payable to order or bearer, on the same footing as bills of exchange had received the sanction of the courts, but Holt having become chief justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the chief justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

It is obvious from the preamble of the statute, which merely recites that "it had been held that such notes were not within the custom of Merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The Statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding in *Miller* v. *Race*, 1 Burr, 452, that the property in such note passes, like that in cash, by delivery, and that a party taking it bona fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner, it was held, in *Collins* v. *Martin*, 1 B. & P. 648, that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

Both these decisions of course proceeded on the ground that the property in the bank note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bona fide.

A similar question arose in *Wooley* v. *Pole*, 4 B. & Ald. 1, in respect to an exchequer bill, notoriously a security of modern growth. These securities being made in favor of blank or order, contained this clause, "If the blank is not filled up the bill will be paid to bearer." Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants on a bona fide advance of money. It was held by three judges of the Queen's Bench, BAYLEY, J., *dissentiente*, that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of HOLROYD, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. "The Courts," he says, "have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds:

These authorities shew, that not only money itself may pass, and the right to them may arise, by currency alone, but further, that these mercantile instruments, which entitled the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property [i.e., money] to which such instruments give the right, and which is in itself current, and

the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it.

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a *cheque*. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement of consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admissions of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by draft of the customer (see *Pott* v. *Clegg*, 16 M. & W. 321). Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purpose of clearance, by which they become bound of one another.

Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of *Lickbarrow* v. *Mason*, 2 T.R. 63, that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of the trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

b) Formation of Negotiable Contracts

LITTLE *v.* SLACKFORD

Moody and Malkin's Reports 171 (1828)

Debt for money paid. The defendant being indebted to J. S. for work done, gave him an unstamped paper addressed to the plaintiff in the following words:

"Mr. *Little*, please to let the bearer have seven pounds, and place it to my account, and you will oblige

"Your humble servant,

"*R. Slackford*"

There was also some slight evidence, that the defendant had acknowledged the debt.

Comyn, for the defendant, objected that the paper produced was a bill of exchange, and could not be read for want of a stamp, and the other evidence would not warrant a verdict.

LORD TENTERDEN, C. J. I think no stamp is necessary; the paper does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, "You will oblige me by doing it." Even without the paper, the other evidence would probably entitle the plaintiff to a verdict.

Verdict for the plaintiff.

QUESTIONS

1. What issue was under consideration in this case? How was it decided?
2. What difference did it make in the case whether the instrument sued upon was a bill of exchange or not? If it was not a bill of exchange, upon what theory did the plaintiff recover on it?
3. Action by H on the following paper: "Mr. Nelson will oblige Mr. Webb, by paying J. Ruff, or order twenty guineas on his account. H. Webb," Whether H can recover depends upon the question whether this is a bill of exchange. What decision?
4. H declares on the following instrument as a bill of exchange: "Mr. A, please pay bearer of these lines £36, and charge the same to my account. D." The defendant objects that the action cannot be maintained because the instrument is not a bill of exchange. What decision?
5. Is the following instrument a bill of exchange? "Messrs. A and B, please to send £10 by bearer because I am not able to come after it."

6. "To A: We authorize you to pay $100 to P. D." Is the foregoing a bill of exchange?
7. What justification is there for the formal requisite of a bill of exchange which this case lays down?
8. Trace briefly the history of bills of exchange.

CURRIER *v.* LOCKWOOD

40 Connecticut Reports 349 (1873)

Seymour, C. J. The first question in this case is whether the writing sued upon is a promissory note within the meaning of those words in the statute of limitations. The statute is as follows: "No action shall be brought on any bond or writing obligatory, contract under seal, or promissory note not negotiable, but within seventeen years next after an action shall accrue." The instrument sued upon is as follows:

"Bridgeport, Jan. 22d, 1863, $17.14. Due Currier & Barker seventeen dollars and fourteen cents, value received.

"Frederick Lockwood"

Promissory notes not negotiable are by the statute recited above put upon the footing of specialties in regard to the period of limitation, and for most other purposes such notes have been regarded as specialties in Connecticut. The instrument, however, to which this distinction has been attached is the simple express promise to pay money in the stereotyped form familiar to all. The writing given in evidence in this case is a due bill and nothing more. Such acknowledgments of debt are common and pass under the name of due bills. They are informal memoranda, sometimes here as in England in the form "I.O.U." They are not the promissory notes which are classed with specialties in the statute of limitations. The law implies indeed a promise to pay from such acknowledgments; but the promise is simply implied and not expressed. It is well said by Smith, J., in *Smith* v. *Allen*, 5 Day, 337, "Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt, but an agreement to pay it, this amounts to an express contract."

In that case the words "on demand" were held to import and to be an express promise to pay. That case adopts the correct principle, namely, that to constitute a promissory note there must be an express

as contra-distinguished from an implied promise. The words "on demand" are here wanting. The words "value received" which are in the writing signed by the defendant, cannot be regarded as equivalent to the words "on demand." The case of *Smith* v. *Allen* went to the extreme limit in holding the writing there given to be a promissory note, and we do not feel at liberty to go farther in that direction than the court then went.

The writing then not being a promissory note, the plaintiff's action is barred by the six years' clause of the statute, unless revived by a new promise to pay.

A new trial is not advised.

QUESTIONS

1. Who was suing on the note in the principal case? What difference did it make whether it was negotiable or non-negotiable?
2. M signs and delivers to P the following paper: "I.O.U. $500, to be paid 22 inst." P indorses it to H who sues on it. What decision?
3. M signs and delivers to P this paper: "I.O.U. $500." P indorses it to H who sues on it. What decision?
4. M signs and delivers to P the following paper: "Due P $95 on demand." P indorses it to H who sues M. What decision?
5. M signs and delivers to P the following paper: "Due P $25." P indorses the instrument to H who sues on it. What decision?
6. M signs and delivers to P this paper: "Due P or order $25." P declares on this as a negotiable promissory note. What decision?
7. What justification is there for the rule which the court lays down in the principal case?
8. Trace briefly the origin and development of negotiable promissory notes.

PUTNAM *v.* CRYMES

1 McMullan's South Carolina Reports 9 (1840)

The plaintiff in this case was not the original payee, but held the note by transfer to himself by delivery. The note was made payable to Mancil Owens or holder; the plaintiff declared as holder, and defendants demurred on the ground that the holder could not sue without a written assignment. I regarded holder as synonymous with bearer and overruled the demurrer.

Appeal by defendants on the ground that the demurrer should have been sustained.

Butler, J. The word bearer is usually inserted in a negotiable note, transferable by delivery. But without it, the maker of a note

may make it transferable by delivery, either by circumlocution, or by using a word of precisely the same import. As if a note were made payable to A. B., or anyone to whom he may deliver it; or to anyone who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to anyone who acquires possession by delivery, he has no right to complain when it is presented to him without a written transfer. *Holder* is a word of the same import as bearer, and both may acquire a title by lawful delivery, according to the terms of the contract. All the law requires is, that the paper must have negotiable quality by delivery; otherwise the instrument must be transferred by written indorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all.

The decision below is affirmed.

QUESTIONS

1. What issue was under consideration in this case? How was it decided? What formal requisite of a negotiable instrument does this case lay down?
2. What is meant by words of *negotiability?* Are they necessary for the negotiability of a bill or note?
3. Were there words of negotiability in the instrument under consideration in the principal case? What were they?
4. M makes a note payable "to P." P indorses it to H who sues M on it. M contends that H cannot sue on the instrument in his own name. What decision?
5. D draws a bill on A payable "to P or his assigns." A accepts the bill. P indorses it to H who sues A on it. What decision?
6. M makes a note payable "to P" and writes across it "negotiable." What is the effect of this word on the instrument?
7. M makes a note payable "to P or order" and writes across it, "This note is not negotiable." What is the effect of these words on the instrument?

ALMY *v.* WINSLOW

126 Massachusetts Reports 342 (1879)

Contract on the following instrument, declared on as a promissory note: "New Bedford, April 26, 1870. On demand with interest for value received please pay Charles Almy or order fifty-five and 33/100 dollars. George F. Winslow."

"Witness Asa C. Smith"

Writ dated March 28, 1877, and returnable to the Superior Court. The defendant demurred, on the ground that the declaration set forth no legal cause of action. The court overruled the demurrer; and the defendant alleged exceptions.

The defendant then filed an answer, admitting the execution of the paper declared on, and that the same was for a valid consideration; and alleging that the cause of action did not accrue within six years. At the trial, before GARDNER, J., without a jury, the judge ruled that the instrument declared on was a witnessed promissory note and was not barred by the statute of limitations; and ordered judgment for the plaintiff. The defendant alleged exceptions.

SOULE, J. The only question in this case is, whether the instrument sued on is or is not a witnessed promissory note. That it is witnessed is admitted. The controversy is as to the legal effect to be given to its terms. It does not purport to be a mere acknowledgment of the existence of a debt, and is admitted to have been given for a valuable consideration. It is in the form of a draft or bill of exchange, except that it is not addressed to or drawn upon anyone, and therefore lacks one essential characteristic of a bill. It is not in the ordinary form of a promissory note, for it is not in express terms a promise, but a request to pay. It is familiar law, however, that no particular form of words is necessary to constitute a promissory note. There need not be a promise in express terms, it being sufficient if an undertaking to pay is implied in the contents of the instrument. *Dagget* v. *Daggett*, 124 Mass. 149; *Franklin* v. *March*, 5 N.H. 364; *Carver* v. *Hayes*, 47 Maine, 257; *Russell* v. *Whipple*, 2 Cowen, 536; *Brooks* v. *Elkins*, 2 M. & W. 74.

The instrument sued on was intended by the parties to take effect as a contract. The language imports this; and no other inference can be drawn from the fact that it was given for value. It cannot operate as a draft, check, or bill of exchange because there is no drawee. One who signed an acceptance on it would not be liable as acceptor of a bill. *Peto* v. *Reynolds*, 9 Exch. 410. To be operative at all, as a contract, it must be as a promissory note. It was said in *Edis* v. *Bury*, 6 B. & C. 433, by Lord Tenterden, that, "where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or a bill of exchange." In that case the instrument was in the form of a promissory note, but had been accepted by a person whose name had been written on the corner of the paper at which the name of the

drawee of a bill is usually placed; the maker, being sued, contended that he was discharged for want of notice of dishonor as drawer of a bill. The court decided otherwise. To the same effect is the decision in *Lloyd* v. *Oliver,* 18 Q.B. 471. It has been repeatedly held, that, where the drawer and drawee of an instrument in the form of a bill of exchange are the same person, it may be declared on as a promissory note. *Miller* v. *Thomson,* 3 Man. & Gr. 576; *Allen* v. *Sea Assur. Co.* 9 C. B. 574; *Fairchild* v. *Ogdensburgh, &c. Railroad,* 15 N.Y. 337. The reason is obvious. The drawer of a bill on another assumes only a conditional liability; his contract is that he will pay if duly notified of dishonor of the draft; but when the drawer is the drawee, too, such notice would be an empty form, and his undertaking is not conditional, but absolute. The doctrine of the cases cited above on this point is recognized and approved in *Commonwealth* v. *Butterick,* 100 Mass. 12.

In view of the foregoing authorities, there seems to be no injustice in holding that an instrument in the form of that sued on is to be regarded, in passing upon the rights of the signer and the payee, as a promissory note. The signer, having made the instrument in the form of a bill of exchange, but without addressing it to anyone as drawee, may properly be held to have intended to assume the absolute liability to pay, which he would have assumed if he had addressed the instrument to himself. Any other view makes the instrument valueless. It does not contain anything which informs the payee what is to be done in order to fix the liability of the signer. If the undertaking of the signer is not absolute, it is nothing.

We are of the opinion that the instrument sued on was in legal effect a promissory note, and that, being duly attested, action on it was not barred by the statute of limitations.

Exceptions overruled.

QUESTIONS

1. Could the instrument in the principal case have been declared upon as a bill of exchange? If not, why not?
2. Upon what theory did the court permit the plaintiff to recover in his action, declaring upon the instrument as a promissory note?
3. A placed an acceptance upon a bill that was complete in all respects except that it was not signed by a drawer. In this form it is indorsed to H who sues A on it. What decision?
4. D draws an instrument in this manner and signs it: "Pay to P or order $100 and charge to my account." A accepted the instrument. P

indorsed the instrument to H. What are the rights of H on the instrument?

5. D draws this instrument: "Pay to P or order $500 at 58 South State Street." A, whose place of business is located at 58 South State Street, places an acceptance on the instrument. P indorses the instrument to H. What are the rights of H on the instrument?
6. D signs and delivers the following instrument to P: "Pay P or order at the Corn Exchange National Bank of Chicago, 30 days from date, $250." May P declare upon this instrument as a bill of exchange? If not, may he declare upon it as a promissory note?
7. D signs and delivers to P the following instrument: "To A and B: Pay to P or order $300." Is this valid as a bill of exchange?
8. Would it be valid as a bill of exchange if it were drawn to "A or B"? If it were drawn to "A and then to B"?

McCALL *v.* TAYLOR

34 Law Journal (Common Law) Reports (N.S.) 365 (1865)

The first count was against the defendant, as the acceptor of a bill of exchange for £300. The second count was on the same instrument as a promissory note, of which the defendant was alleged to be the maker.

At the trial, before BYLES, J., at the London Sittings after Hilary Term last, it appeared that the instrument declared on in the first and second counts was in the following form:

"£300. Four months after date, pay to my order the sum of three hundred pounds for value received.

"To Captain Taylor,
"Ship Jasper"

There was no date to this instrument nor the signature of any drawer; but there was written across it by the defendant these words, "Accepted William Taylor."

This instrument was given to the plaintiff by one Milne, the broker of the ship "Jasper," on account of goods supplied to such ship by the plaintiff. The defendant was the captain of the "Jasper"; but the jury found that the goods had not been supplied on his credit, and that there was no debt due from the defendant.

The learned judge was of opinion that the instrument could not be declared on either as a bill of exchange or promissory note, and a verdict was accordingly entered for the defendant; but leave was

reserved to the plaintiff to move to enter a verdict on either the first or second counts, if the instrument could be declared on as either a bill or note.

Erle, C. J. I am of opinion that this rule should be discharged. The declaration is on a bill of exchange, and also on the same instrument described as a promissory note. It has no date and no drawer's name: but the defendant wrote his acceptance across it; and the question is, has the holder of such an instrument a right to declare on it either as bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note; and there has been no case cited as an authority for its being considered as either a bill or a note. It is, in fact, only an inchoate instrument, though capable of being completed. Let the party who has the authority to make it a complete instrument do so; but if he will not do this, he cannot sue on it. The case of *Stoessiger* v. *South Eastern Railway Company*, 3 El. & B. 549; s.c. 23 Law J. Rep. N.S. Q.B. 293 is directly in point. In the other cases which have been referred to, where effect was given to the instrument, nothing more had to be done to make the instrument complete; and so those cases are distinguishable from the present. The captain may possibly have given his acceptance for the necessaries supplied to the ship, and the plaintiff may have had authority to put his name as drawer; but that should have been shown by doing so. As it is, he seeks to sue on it without putting his name to it as drawer; and it may be that the reason is, because he never had authority to insert a drawer's name. It is, however, sufficient for us to say that the instrument is inchoate and imperfect; and therefore there is no ground for making this rule absolute.

Rule discharged.

QUESTIONS

1. Why was the plaintiff not permitted to recover on this instrument as a bill of exchange? As a promissory note?
2. Suppose that the plaintiff had inserted his name in the instrument as drawer, would he have been entitled to recover on it as a bill of exchange?
3. Suppose that the payee had inserted his name in the instrument as drawer, and had indorsed it to H, a holder in due course, what would have been the rights of H against the acceptor?
4. H sues M on a note alleged to have been made by M. M's signature appears in writing at the top of the note. What decision in the action?
5. H sues D on a bill, on the face of which, at the bottom, appears the numbers, "1.2.8." H offers evidence that D used these figures as a signature. Is the evidence admissible?

6. H sues M on a note signed, "Southside Grocery Company." He offers evidence that this is M's trade-name. Is the evidence admissible?
7. Can there be a negotiable instrument which is not in writing? Why or why not?
8. On what substance or material must a negotiable instrument be made? May the operative words be written in pencil? May they be written by a typewriter? May they be printed?
9. Is it necessary to the validity of a negotiable instrument that it be dated? What is the effect of issuing an undated bill or note?

DAVIS *v.* GARR

6 New York Reports 124 (1851)

Action of assumpsit commenced in the superior court of the city of New York, in September, 1845, by the plaintiffs, Charles A. Davis and Louis McLane, describing themselves as survivors of "Charles A. Davis, Louis McLane and Joseph M. White, trustees of the Apalachicola Land Co.," against the defendant as administrator of the estate of Colin Mitchell, deceased, to recover the amount of three promissory notes, made by the intestate, the first of which was in the following words:

$4492.50 Apalachicola, April 21, 1836

Twelve months after date I promise to pay to Joseph M. White, Charles A. Davis and Louis McLane, Trustees of the Apalachicola Land Company, or their successors in office, or order, four thousand four hundred and ninety-two dollars and fifty cents, with interest from date at eight per cent per annum, for value received.

Colin Mitchell

The two other notes differed from the first only in regard to the times at which they were made payable, being respectively two and three years after date. The declaration contained three counts on the three respective notes, and a fourth count for work and labor, goods sold, moneys lent, etc.

The Supreme Court in March, 1851, affirmed the judgment of the superior court, and the defendant appealed to this court.

GARDINER, J. The first objection presented by the pleadings on the part of the defendant is, that the written instruments set forth in the declaration are payable to the trustees therein named or their successors in office, and that the uncertainty as to which of the two the payment is to be made invalidates them as promissory notes, though not as agreements.

I am unable to perceive any such contingency in the contracts. If the plaintiffs are to be considered as the representatives of a corporation, and the suit instituted for the benefit of their principal, the payment must be made to them as trustees. If their term of office expired before the commencement of the suit, then, and in that event only, would a right of action inure to their successors. There never was a time, consequently, when the maker of the notes could discharge himself by a payment made at his election, to these plaintiffs, or their successors. The term successor implies one who takes a place that another has left. It might be as reasonably contended, that the payee was contingent, where a note was made payable to A, or his executors, or administrators, etc.

It has been determined that an undertaking to pay C or D, or his order, is not a promissory note because payable to either of the payees, and that only on the contingency of its not being paid to the other. (Story on *Promissory Notes*, sec. 37; 4 Wend. 575; 2 B. & Ald. 417.) The distinction between those cases (even if the doctrine thereby established is sound) and the present is that the contingency in them was apparent on the face of the instrument. Here there was no uncertainty in the contract, when the notes were made, or became payable; the ambiguity, if any, would arise from a change of trustees after the note took effect as a perfected contract.

Secondly, if the plaintiffs were not the representatives of a corporation, as the defendant insists, they could sustain the action in their own name; the word "Trustees" would be merely a designation of the persons, and the phrase "their successors" may be rejected as surplusage. It has been decided that a note payable to a trustee, or agent, or executor, will maintain a suit in the name of the person mentioned. (3 Harrington, 385; 3 Mass. R. 103; 2 Eng. [Ark.] R. 382. And see 9 John. 334; 8 Cowen, 31, and cases there cited.) I think, therefore, that these contracts are promissory notes, and consequently negotiable.

Judgment affirmed.

QUESTIONS

1. M signs and delivers to P the following instrument: "I promise to pay on demand $250." What are the rights of P on this instrument?
2. P indorses the instrument to H who sues M on it. What decision?
3. M signs and delivers the following instrument: "I promise to pay to the estate of P, or order, thirty days after P's death, the sum of $100." Is this a negotiable promissory note? If so, who is the payee?

4. M executes and delivers the following note: "I promise to pay to the order of P and N the sum of $300." Is this a negotiable promissory note? If so, who is the payee?
5. "I promise to pay to the order of P or N the sum of $300." Is this a negotiable promissory note? If so, who is the payee?
6. "I promise to pay to the order of P or his executors the sum of $300." Is this a negotiable promissory note? If so, who is the payee?
7. M executes a note to "P, Cashier." P is the cashier of the Woodlawn State Bank. Is this instrument negotiable? Who is the payee?
8. "I promise to pay to the order of the President of the X Company $500 on demand." Is this instrument negotiable? Who is the payee? The person who was president of the X Company, when the instrument was executed, dies before the note matures. Who can bring action on it?
9. M executes and delivers the following note: "Six months after date, I promise to pay to the order of the officers for the time being of the X Society, unincorporated, the sum of $1,000." Is this note negotiable?
10. Suppose that the X Society had been a corporation, would your answer to the foregoing question have been the same?
11. D draws the following instrument: "To A: Pay to A or his order the sum of $500." A indorses the instrument to H. (*a*) What are the rights of H on the instrument before A accepts? (*b*) What are his rights after A accepts?
12. "To D: Pay to D or order the sum of $100. (*Signed*) D." D writes across the instrument "Accepted" and signs it. What kind of an instrument is this? What is its effect when indorsed away by D?
13. M makes a note payable to "cash." Is it negotiable? Who is the payee?
14. M makes a note payable to X, not intending X to represent any real person. Is the instrument negotiable? Who is the payee?
15. X, representing that he is P, induces M to sign a note payable to P or order. X, in the name of P, transfers the note to H. H sues M. H sets out the foregoing facts as a defense. What decision?

HATCH *v.* FIRST NATIONAL BANK OF DEXTER

94 Maine Reports 348 (1900)

SAVAGE, J. This action is brought by the plaintiff as indorsee on a certificate of deposit of the following tenor:

The First National Bank, Dexter, Maine, Jan. 6th, 1897.

Olive Hodge has deposited in this bank five hundred and sixty dollars payable in current funds to the order of herself on return of this certificate properly indorsed. Int. at 3% per annum if on deposit 6 mos.

C. M. Sawyer, Cashier

The defendant requested the presiding justice to rule, that the action could not be maintained by the plaintiff, as indorsee, for the reason that the certificate of deposit in question was not a negotiable instrument. The presiding justice declined so to rule, and the defendant excepted.

The defendant contends that the instrument is non-negotiable for three reasons: First, because it was written payable in "current funds"; secondly, because of the clause "Int. at 3% per annum, if on deposit 6 mos.": and lastly, because of the condition of payment expressed in the words, "on return of this certificate properly indorsed."

That a certificate of deposit, as such, is a negotiable instrument is held by almost unanimous authority—2 Daniel on *Negotiable Instruments*, section 1702; *Miller* v. *Austen*, 10 How. 218—and is not here denied by the learned counsel for the defendant. They only contend against certain features in the certificate before us. This court, following universal authority, has recently defined a negotiable instrument to be one which runs to order or bearer, is payable in money for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency. *Roads* v. *Webb*, 91 Maine, 406. If the certificate in question does not conform to these requirements, it must be held to be non-negotiable.

The first objection is that it is not made payable in "money," that "current funds" in which it is made payable, should not be judicially interpreted to mean "money." We do not think this contention should prevail. This subject has been discussed exhaustively by many courts, and the conclusions they have reached on the one side and the other are not in harmony. But we think that the modern and better doctrine is that the term "current funds," when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money, funds which are current by law as money, and that when thus construed, a certificate of deposit payable in current funds, is in this respect negotiable. It is well known that certificates of deposit are commonly made payable in "currency" or in "current funds," and we believe that the interpretation we have given is in accord with the universal understanding of parties giving and receiving these instruments, an understanding which we should resort to as an aid to interpretation, unless the words themselves fairly import some other meaning. Some courts

hold that evidence may be received to show the meaning of the terms "currency," "current funds." But, in the absence of evidence, these courts come to opposite conclusions. For instance, in Iowa the court holds that notes payable in currency are prima facie non-negotiable, but that evidence may be received to prove that the word "currency" describes that which by custom or law is money, and thus the instrument may be shown to be commercial paper. *Huse* v. *Hamblin*, 29 Iowa, 501. On the other hand, in Michigan, it was held that where a certificate of deposit was made payable in currency, "prima facie at least, that must be held to mean money current by law, or paper equivalent in value circulating in the business community at par." "Such, we think," said the court, "is the general signification, the fair import and the ordinary legal effect of the term." *Phelps* v. *Town*, 14 Mich. 374; *Phoenix Ins. Co.* v. *Allen*, 11 Mich, 501.

Still other authorities hold that the terms "currency" or "current funds" used in commercial paper, *ex vi termini*, mean money. Judge Campbell, in *Black* v. *Ward*, 27 Mich. 191, after a critical examination of a mass of authorities, declared that, with few exceptions, "the general course of authority is in favor of the negotiability of paper payable in currency or in current funds. And these decisions rest upon the ground that those terms mean money, as the necessity of having negotiable paper payable in money is fully recognized."

"The term 'funds' " say the court in *Galena Ins. Co.* v. *Kupfer*, 28 Ill. 332, "as employed in commercial transactions, usually signifies money. Then the term 'current funds' means current money, par funds or money circulating without any discount." Respecting an instrument payable in "current funds," the Maryland court said: "The words 'current funds' as used in the paper before us mean nothing more nor less than current money, and so construed the instrument was negotiable." *Laird* v. *State*, 61 Md. 311. See also *Miller* v. *Race*, 1 Burr, 52; 1 Smith's *Leading Cases*, 808. The Supreme Court of the United States had occasion, in *Bull* v. *Bank of Kasson*, 123 U.S. 105, to pass upon the negotiability of an instrument which had been made payable in "current funds." That court said: "Undoubtedly it is the law that, to be negotiable, a bill, promissory note, or check, must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy

their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of these words."

Exceptions overruled.

QUESTIONS

1. What was the form of the alleged negotiable instrument under consideration in this case? Is it in the nature of a bill or note?
2. What difference did it make in the principal case whether the instrument sued on was negotiable or not?
3. M executes and delivers a note to P by which he promised to pay "$50 in good merchantable wheat." P indorsed the note to H, who brings this action on it against M. What decision?
4. Action by H on a note, made by M payable to P or order, "in New York funds or their equivalent." What decision?
5. What various constructions may be placed upon such expressions as "current funds" and "current money"? What construction did the court place on the words "current funds" in this case?
6. What difference does it make, so far as negotiability is concerned, what construction is placed on such words?
7. M executes a promissory note in Toronto, promising to pay P or order "£100 in Detroit, thirty days after date." P indorses the note to H who sues M on it. What decision?
8. M executes a promissory note, promising to pay P or order "£100 in Detroit, in American dollars, thirty days after date." What decision in an action by H against M on the note?
9. D draws a bill on A, ordering him to pay P or order "$1,000 in gold coins." What decision in an action by H against M on the note?
10. Why must an instrument, to possess the quality of negotiability, be made payable in money?
11. Is an instrument payable in legal tender, if otherwise regular and complete, negotiable? What is legal tender?
12. Was the negotiability of the instrument in the principal case affected by the stipulation that payment would be made "on return of this certificate properly indorsed"?
13. Did the provision, "Interest at 3 per cent per annum, if on deposit six months," affect the negotiability of the instrument?

SMITH *v.* MYERS

207 Illinois Reports 126 (1904)

Ricks, J. This is an appeal from the Appellate Court for the First District affirming a judgment of the Circuit Court of Cook County against appellant for costs in a suit brought by appellant, against appellee, in an action of assumpsit. The action was upon the following instrument in writing:

Waterbury, Conn., Aug. 1, 1893

One year after date I promise to pay to the order of Norman D. Grannis thirty-five hundred dollars at the Fourth National Bank. Value received, with interest at 6 per cent per annum and taxes. Due August 1, 1894.

W. C. Myers

A promissory note, as defined by the English Bill of Exchange Act (sec. 83) is: "An unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum of money to, or to the order of, a specified person or to bearer;" or as usually defined: "An unconditional promise in writing for the payment of a certain sum of money absolutely and in all events." (4 Am. & Eng. Ency. of Law. (2d. ed., 77.) And as defined by Chitty: "A promise or agreement in writing to pay a specified sum at a time therein limited or on demand, or at sight to a person therein named, or to his order, or to the bearer." (Chitty on *Bills*, 516.) Many definitions are given, varying only in that in some of them the parties to such instruments are specified more particularly and the time of payment is stated in different terms, but all agree that in order to constitute a promissory note the instrument must be for a specified sum or certain sum of money. *Lowe* v. *Bliss*, 24 Ill. 168.

If effect is to be given to the language of this instrument and no part of it is to be rejected, it being quite clear that the addition of the words "and taxes," which must, if they have any meaning at all, refer to the taxes upon the instrument itself or the money loaned and represented by it, the amount of which is not fixed by the instrument nor is there any means found in the instrument by which the amount can be fixed and resort to extrinsic evidence being necessary to fix the same, it necessarily follows that the sum to be paid is uncertain and the instrument is not a promissory note. *Walker* v. *Thompson*, 108 Mich. 686; *Carmody* v. *Crane*, 110 *id.* 508; *Donaldson* v. *Grant*,

15 Utah, 231; *Lockrow* v. *Cline*, 46 Pac. Rep. 720; *Brooke* v. *Storthers*, 110 Mich. 562; *Garnett* v. *Myers*, 91 N.W. Rep. 400.

Appellant contends, however, that the word "taxes" is so indefinite and so uncertain, when read in connection with the entire instrument, that it ought to be rejected as surplusage, and in support of that contention refers to *Hoyt* v. *Jaffray*, 29 Ill. 104, *Hill* v. *Todd*, 29 *id.* 101, and *Bilderback* v. *Burlingame*, 27 *id.* 338. We do not think the cases cited support the contention of appellant. *Lowe* v. *Bliss*, *supra*, was an action by the payee against the maker of an instrument in the form of a note for the payment of a certain sum of money at the Bank of Kankakee, Illinois, "with current rate of exchange on New York." In that case special counts were filed in the declaration upon the note, but there was an omission to state anything in regard to the provision for the New York exchange. Objection was made to the instrument being admitted in evidence on the ground that there was a variance between it and the declaration, and that objection was overruled. On appeal to this court the judgment of the lower court was reversed, and it was held that the instrument was not a promissory note because of the provision as to current exchange on New York which made the sum to be paid uncertain, as exchange varied from time to time and in different banks and localities. In that case the note was executed and delivered in New York. In *Hill* v. *Todd*, *supra*, the note was delivered in Chicago, Illinois, and payable at the office of the payee "in this city," and was for a certain sum of money, "with current rate of exchange." In that case it was held that as the note was delivered and payable in Chicago, there could be no exchange when paid at the place where payment was provided for, and that the words "with current rate of exchange" could be rejected as surplusage. *Hoyt* v. *Jaffray*, *supra*, was upon an instrument in the form of a note, payable at Miller's Bank, Aurora, Illinois, "with current rate of exchange on New York," and following the case of *Hill* v. *Todd*, *supra*, the provision with reference to exchange was held to be surplusage and the instrument a promissory note. In *Bilderback* v. *Burlingame*, *supra*, the action was upon an instrument reading: "Due W. B. Goddard, $450.00; to be paid in lumber when called for; in good lumber at $1.25." That instrument was held to be a promissory note, and it was further held that as against the maker it was not necessary to prove the consideration.

By the statute of Connecticut, if the instrument in question had been a promissory note—and without the provision to pay taxes it unquestionably would have been—it was subject to taxation. *Howell v. Todd*, Fed. Cas. No. 6783, was a case in the United States Circuit Court in Connecticut upon a note very similar to this, and the court there said in reference to the same: "The second ground is that the amount to be paid is uncertain for it provides for the payment not only of interest, which is certain, but also of taxes, the amount of which must necessarily be uncertain until they are assessed or imposed according to law. The instrument in question quite certainly is not a promissory note."

In the case at bar, the instrument sued on provides for the payment of taxes. Whether the taxes shall be paid annually or semiannually, whether before the note becomes due or after, or at the time of its maturity, is uncertain. By the law merchant, and by the statutes of the states in aid thereof, negotiable instruments occupy a highly useful and valuable place in the commerce and business of our people. There is no other form of contract known that in so few words may contain so many well-understood and thoroughly established legal rights and liabilities. Their presence and use are a boon, and to destroy or to materially impair them would be a business calamity. To permit, by strange and unusual provisions, matters in no way relating to or affecting trade or commerce to be incorporated into them unsettles established rules of construction and makes that dangerous and uncertain which before was definite and well understood. We are unwilling to assent to the contention that such instruments can or ought to be construed as negotiable instruments or promissory notes.

Under these views it is unnecessary to discuss other questions urged, as this seems decisive of the case, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

QUESTIONS

1. Why did the court in this case refuse to accord to the instrument in question the quality of negotiability?
2. "I promise to pay to P or order the sum of $500 and such other sums as may become due in the meantime." What decision in an action by H against M on this instrument as a negotiable promissory note?

3. What was the decision of the court in the case of *Lowe* v. *Bliss*, 24 Ill. 168, cited in the opinion of the principal case? Do you agree with the conclusion in this case?
4. What was the decision of the court in the case of *Hill* v. *Todd*, 29 Ill. 101, cited in the opinion of this case?
5. M executes and delivers to P the following note: "I promise to pay to P or order the sum of $500; court costs and attorney's fees to be added in case action is brought on this note." Is this a negotiable note?
6. "I promise to pay to P or order the sum of $500 with legal rate of interest from date until collected." Is this a negotiable note?
7. "I promise to pay to P or order the sum of $500 with 7 per cent interest to maturity and 10 per cent after maturity until collected." Is this instrument negotiable?
8. Is there any justification for the doctrine of the principal case? For the doctrine of *Lowe* v. *Bliss*?

WHITE *v.* CUSHING

88 Maine Reports 339 (1896)

FOSTER, J. The plaintiff sues as indorsee of an order signed by the defendant of the following tenor:

$120 Dover, Oct. 27th, 1893
Piscataquis Savings Bank

Pay James Lawler, or order, one hundred and twenty dollars, and charge to my account on book No. –.

J. N. Cushing.

Witness—
The bank book of the depositor must accompany this order.

The order was indorsed in blank on the back by James Lawler and Samuel Lewis, and the plaintiff claimed to recover against the defendant as upon a negotiable instrument. The real question presented is whether the instrument declared on is negotiable, so that an action may be maintained upon it in the name of the indorsee.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation, to a third party or his order or bearer.

It has often been held that a bill or note is not negotiable if made payable out of a particular fund. But there is a distinction between such instruments made payable out of a particular fund, and those

that are simply chargeable to a particular account. In the latter case, the payment is not made to depend upon the adequacy of that fund, the only purpose being to inform the drawee as to his means of reimbursement, and the negotiability of the instrument is not affected by it.

The objection that is raised to the negotiability of this instrument is, not that it is made payable out of a particular fund, but that it is subject to such a contingency as necessarily embarrasses its circulation and imposes a restraint upon its negotiability, by means of these words contained upon the face of the order: "The bank book of the depositor must accompany this order." Although these words are upon the face of the order below the signature of the drawer, they were there at the time of its inception, became a substantive part of it, and qualified its terms as if they had been inserted in the body of the instrument. *Littlefield* v. *Coombs*, 71 Maine, 110; *Cushing* v. *Field*, 70 Maine, 50, 54; *Johnson* v. *Heagan*, 23 Maine, 329; *Barnard* v. *Cushing*, 4 Metcalf, 230; *Heywood* v. *Perrin*, 10 Pick. 228; *Benedict* v. *Cowden*, 49 N.Y. 396; *Costelo* v. *Cromwell*, 127 Mass. 293, and cases there cited.

Was the order negotiable? The answer to that depends upon the effect of the words: "The bank book of the depositor must accompany this order." If not negotiable, the plaintiff as indorsee cannot maintain an action upon it. *Noyes* v. *Gilman*, 65 Maine, 589. If their effect is such as constitute a contingency in relation to the payment of the order, dependent upon the production of the drawer's bankbook by the holder or indorsee of the order, then they must be regarded as such an embarrassment to the negotiation of the order, and such a restriction upon its circulation for commercial purposes as to render it non-negotiable.

Without these words the order is payable absolutely, and there is no apparent uncertainty affecting its negotiability. With them, the order is payable only upon contingency, or condition, and that is upon the production of the drawer's bankbook. This is rendered imperative from the language employed, and the bank upon which the order is drawn would have the right to insist upon such production of the book in compliance with the terms of the order; and the case shows that it has refused payment upon presentation of the order for the reason that it was not accompanied by the bankbook. It cannot, therefore, be regarded as payable absolutely and without any contingency that would embarrass its circulation. The drawer has it in

his power to defeat its payment by withholding the bankbook. Certainly the bankbook of the depositor is within his own control rather than that of the indorsee of this order.

It was the necessity of certainty and precision in mercantile affairs and the inconveniences which would result if commercial paper was incumbered with conditions and contingencies, that led to the establishment of an inflexible rule that to be negotiable they must be payable absolutely and without any conditions or contingencies to embarrass their circulation. *American Ex. Bank* v. *Blanchard*, 7 Allen, 333. In that case the words "subject to the policy" being included in a promissory note, were held to render the promise conditional and not absolute, and so the note was held not to be negotiable. *Noyes* v. *Gilman*, 65 Maine, 589, 591; *Hubbard* v. *Mosely*, 11 Gray, 170.

A case in every essential like the one we are considering was before the Supreme Court of Pennsylvania in 1891. A facsimile of the order is given in the opinion. No two cases could be nearer alike. There, as here, the order was drawn on a savings bank. The suit was by the indorsee against the drawer as in this case. There, as here, the order contained a statement upon its face, but below the signature of the drawer, that the "Deposit book must be at bank before money can be paid." In discussing the question of its negotiability cases are cited from the courts of Maine, Vermont, Massachusetts, and New York, as well as from Pennsylvania. In the course of the opinion the court says:

It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations, in force between it and the depositor, requiring certain things to be done before payment could be required, viz.: previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and presentation of the deposit book at the bank, so that the payment might be entered therein.

It is in substance, merely an order on the dollar savings bank to pay W. J. Quinn, or order, nine hundred dollars in nine weeks from date, or February 1st, 1888, provided he or his transferee present to the bank, with the order, the notice tickets and also produce at and before the time of payment the drawer's deposit book. As already remarked, these are undoubtedly prerequisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also prerequisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply.

Iron City Nat. Bank v. *McCord*, 109 Pa. St. 52 (23 Am. State Rep. 166).

The order in question was drawn upon a savings bank, and it is common knowledge that all such banks in this state have a by-law which all depositors are required to subscribe to, that "no money shall be paid to any person without the production of the original book that such payment may be entered therein."

This court in the case of *Sullivan* v. *Lewiston Inst. for Savings*, 56 Maine, 507, has considered the purpose and necessity of these salutary regulations. We should be slow to countenance any departure from this rule needed for the protection of depositors in our savings banks now numbering more than 160,000, and where deposits aggregate nearly $60,000,000.

Inasmuch as this order is not negotiable and no suit can be maintained upon it by the plaintiff as indorsee, it becomes unnecessary to consider the other exceptions.

Exceptions sustained.

QUESTIONS

1. What practical difference did it make to the plaintiff in this case whether the note was negotiable or not?
2. What was there in the note in this case which rendered it non-negotiable?
3. Would the provision, "and charge to my account on Book No. –," have rendered the instrument non-negotiable?
4. D drew the following order on A: "Pay to P or order the sum of $2,000 and deduct the same from my share of the profits of our late partnership business." A accepted the instrument. P indorsed it to H who sued A on it. What decision?
5. The M Bank issues a certificate of deposit in this form: "P has deposited in the M Bank the sum of $1,000 payable to him or his order on the return of this certificate properly indorsed." P indorses the instrument to H, who sues M on it. M contends that it is non-negotiable and that H cannot sue in his own name. What decision?
6. M executes and delivers to P the following instrument: "I promise to pay P or order the sum of $100 as per memorandum of agreement which we have this day entered into." P indorses the instrument to H who sues M on it. What decision?
7. What is the reason for the rule that the promise or order in a negotiable instrument must be absolute and unconditional?

HODGE *v.* SHULER

22 New York Reports 114 (1860)

This was an action against the defendants as indorsers of the following instrument or note:

RUTLAND AND BURLINGTON RAILROAD COMPANY

No. 253 $1,000

Boston, April 1, 1850

In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. and D. W. Shuler, or order, $1,000, with interest thereon, payable semi-annually as per interest warrants hereto attached as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

T. FOLLETT, President. Sam Henshaw, Treasurer.

The court decided that the plaintiff was entitled to recover against the defendants, and gave judgment accordingly.

WRIGHT, J. The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot, for the reason that the instrument set out in the complaint is neither in terms nor legal effect a negotiable promissory note but a mere agreement.

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative to pay in money or railroad stock. It was not optional with the maker to pay in money or stock and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note, might, before its maturity, surrender it in exchange for stock, thus cancelling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We

are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of $1,000 in four years from date, and its promise could only be fullfilled by the payment of the money, at the day named.

Judgment affirmed.

QUESTIONS

1. What was the issue involved in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Suppose that in the instrument it had been provided that the Rutland and Burlington Railroad Company could have discharged its obligation by the delivery of stock, if it chose, what would have been the decision of the court?
3. M executes and delivers to P the following instrument: "I promise to pay P or order $100 and to sell him 10 shares of stock in the X Company." P indorsed the note to H, who brings this action on it against M. What decision?
4. M executes and delivers the following note: "Ten days after date, at my store, I promise to pay P or order $55 in cash or in goods on demand, for value received." P indorses the note to H, who sues M on it. M contends that the note is non-negotiable and that H cannot bring the action in his own name. What decision?
5. D draws the following order on A: "Pay to P or order the sum of $500 in cash or the equivalent in goods and charge to my account." A accepts the instrument. P indorses it to H who sues A on it. What decision?
6. M executes and delivers to P the following note: "I promise to pay P or order the sum of $1,000. Ten shares of stock of the X Company have been delivered to P to secure the payment of this obligation." P indorses the note to H who sues M on it. What decision?

SIEGEL, COOPER & CO. *v.* THE CHICAGO TRUST & SAVINGS BANK

131 Illinois Reports 569 (1890)

Shope, C. J. This was an action of assumpsit, by appellee, against appellants, upon the following instrument:

300 Chicago, March 5, 1887

On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size —X— inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887.

Siegel, Cooper & Co.

Which was indorsed by Dalziel, the payee, to appellee, for value, on the day of its execution.

The first question presented is, Is this instrument negotiable?—and this question has been answered affirmatively by the circuit and appellate courts. The appellate court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance granted by that court.

It appears, that before the time when the privilege of advertising was to commerce, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellants; and it is insisted that the instrument is a simple contract, only, and that therefore the same defense—failure of consideration—is available against the indorsee of the paper for value, and before due, as might be interposed against such paper in the hands of the payee. It is also insisted that the instrument shows on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsee took it with notice, and, by the failure of the payee to perform the condition, no right of recovery exists in the indorsee. It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated—that is, it is a promise to pay a sum certain on a particular day,

in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and, in this instance, amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. Daniel on *Negotiable Instruments*, sections 790–97; *Davis* v. *McCready*, 17 N.Y. 320; *State Nat. Bank* v. *Casson*, 39 La. Ann. 865; *Goodloe* v. *Taylor*, 13 N.C. 458; *Stevens* v. *Blunt*, 7 Mass. 240.

In *State Nat. Bank* v. *Casson, supra*, it is said:

> Plaintiff received the note before maturity, and before a failure of the consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and the payee. It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed.

The most that can be said of a recital in the instrument itself, of the consideration upon which it rests, is, that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient, of itself, to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and in connection with other facts amount to notice. (*Henneberry* v. *Morse*, 56 Ill. 394.) The case at bar does not, however, fall within the rule just stated, for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the fifteenth of May following an interval of seventy days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is, that where the parties insert a specific date of payment, the instrument is then payable at all events, and this, although, in the same instrument, an uncertain and different time of payment may be mentioned, as, that it shall be payable upon a particular day, or upon the

completion of a house, or the performance of other contracts, and the like. (*McCarty* v. *Howell*, 24 Ill. 341, and authorities *supra.*) But the doctrine of this and kindred cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked, for the time of payment in the instrument under consideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability and render the instrument a mere agreement, yet, under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based and although it further appears that such consideration, if executory, may not have been performed. Here, the money was payable, absolutely, on the first day of July, 1887—a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the fifteenth of May thereafter, when the term was to commence. All that the recitals would give notice of was that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months, from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be that the contract would be carried out in good faith, and the consideration

performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold his indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. Wade on *Notice*, section 94a; *Loomis* v. *Maury*, 15 N.Y. 312; *Davis* v. *McCready*, *supra*.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

QUESTIONS

1. What difference did it make in this case whether the instrument in controversy was negotiable or not?
2. Was not the maker's promise conditional upon the payee's performance of his contract of advertising?
3. Can this case be distinguished from the case of *White* v. *Cushing*, *supra*, page 318?
4. What would have been the decision in this case, if it had appeared that Dalziel had forfeited his right to advertise in street cars before the instrument was transferred to the plaintiff?
5. M executes and delivers to P the following promissory note: "I promise to pay P or order the sum of $75 for a wagon I have this day purchased from him." P indorses it to H who brings an action on it against M. M contends that the instrument is not negotiable and that H cannot sue in his own name. What decision?
6. M executes the following note: "Ninety days after date, I promise to pay P or order the sum of $1,500 for a soda fountain this day purchased. The title to the property to remain in P until this note is paid." P negotiates the note. H brings an action on it against M. What decision?
7. In the foregoing case, the soda fountain is accidentally destroyed by fire before the note matures. What decision in an action by H against M on the note?
8. M executes the following note: "I promise to pay P or order the sum of $1,000 in monthly installments of $100 each, beginning three months from date." P negotiates the note. H sues M on it. What decision?
9. In the foregoing case, it is provided in the instrument that the whole sum shall become due in case the maker defaults in the payment of any instalment. What decision in an action by H against M on the note?

McCLENATHAN *v.* DAVIS

243 Illinois Reports 87 (1909)

Farmer, C. J. This is an action of assumpsit brought by appellee, as indorsee, against appellant, Emmons Davis, as maker, and Elizabeth Gamble, as indorser and guarantor, of the following written instrument:

> For value received I promise to pay Elizabeth Gamble, or order, the sum of fifteen hundred dollars in twelve months after I shall become the legal owner of one hundred and fifteen acres of land conveyed to me by my father, H. V. Davis, reserving to him, H. V. Davis, a life estate in said land, by which at his death I am to become possessed of and the owner in fee of said one hundred and fifteen acres, situated in the southeast corner of section 30, in township 18, north, range 11, east of the third P.M., Champaign County, Illinois.
>
> Emmons Davis.
>
> March 6th, 1894.
> Witness: Thomas J. Smith.
> Endorsed and payment guaranteed.—Elizabeth Gamble.

There was a verdict and judgment in favor of appellee in the circuit court. Emmons Davis prosecuted an appeal to the Appellate Court for the Third District. The judgment was affirmed by that court, and he has brought the case to this court by further appeal.

The transaction and circumstances out of which the execution of the instrument sued upon arose were as follows: H. V. Davis was father of appellant, three other sons, and Elizabeth Gamble. In September, 1893, H. V. Davis made appellant a warranty deed, conveying to him one hundred and fifteen acres of land in Champaign County for an expressed consideration of $100. By the deed the grantor reserved to himself a life estate in the land conveyed. He also appears to have made deeds for other lands to his other sons but none to the daughter. Mrs. Gamble was dissatisfied with this and claimed that the sons had by fraud and undue influence secured the deeds from their father, and she insisted upon her brothers making good to her a portion of the estate of her father, which she would be entitled to as one of his heirs at the time of his death. Mrs. Gamble claimed that each of her brothers ought to give her a note for $1,500, and the instrument sued on was executed by the appellant and delivered to Mrs. Gamble. H. V. Davis died in July, 1906,

and within twelve months after that time the instrument sued on was indorsed and transferred by Mrs. Gamble to appellee.

Appellant states in his brief that the vital question in the case is, Was the instrument sued on a negotiable instrument?—and that the decision of that question will be decisive of the case. No other question is discussed in his brief and argument.

In *Dorsey* v. *Wolff*, 142 Ill. 589, it was said a promissory note "may be defined to be a written promise by one person to pay to another person therein named, or order, a fixed sum of money at all events and at a time specified therein or at a time which must certainly arrive." Appellant's contention is that the instrument sued on is not a promissory note because it is not payable at a specified time which must certainly arrive, but is payable upon a contingency which may or may not happen. The contingency upon which it is argued the payment depends is the actual ownership and possession of the land by appellant, and it is said this may never happen, because it may be that the grantor in the deed had no title to the land or that appellant might fail to record his deed and the grantor make another deed to an innocent purchaser or that appellant might, before the death of his father, have joined with him in a conveyance to a third person, thereby destroying appellant's estate and interest in the land before the life estate of his father was terminated. We think there is no merit in this position of appellant. It is not claimed that there is any basis for the contention that it might possibly turn out appellant's father had no title to the land conveyed, and as to the other alleged contingencies, it was in the power of appellant to prevent them happening. Besides, we do not consider them contingencies, within the meaning of the law, that could affect the certainty of the time for the payment of the instrument sued on. Properly analyzed and understood, that instrument recites that H. V. Davis had conveyed to appellant one hundred and fifteen acres of land, reserving a life estate therein; that appellant was to become the owner in fee and possessed of said land upon his father's death, and he promised to pay Elizabeth Gamble $1,500 within twelve months after he became such owner of said land—i.e. within twelve months after his father's death. The payment was not dependent upon a contingency that might never happen. The death of H. V. Davis would entitle appellant to the possession of the land, and his death was certain to happen.

The judgment of the Appellate Court is affirmed.

QUESTIONS

1. What was the issue involved in this case? How was the issue decided? What rule of law can be deduced from the decision?
2. What is the justification for the requirement that there must be certainty as to the time of payment of a negotiable instrument?
3. "I promise to pay P or order the sum of $1,000 thirty days after my death." Is this promise, if otherwise regular and complete, negotiable?
4. "I promise to pay P or order the sum of $1,000 when I am able." Is this note negotiable?
5. D draws the following order on A: "Pay to P or order, upon demand, the sum of $500." A refuses to pay the instrument. H sues D on it. D contends that it is not negotiable because the time of payment is uncertain. What decision?
6. M executes the following note: "I promise to pay P or order the sum of $1,000." This is an action by H against M on the note. M contends that the note is not negotiable because no time of payment is expressed. What decision?
7. D draws the following order on A: "Pay to P or order the sum of $100, on or before January 1, 1923." A accepts the instrument. H sues him on it. A contends that the obligation is not negotiable because the time of payment is uncertain. What decision?

FEARING *v.* CLARK

16 Gray's Massachusetts Reports 74 (1860)

Action of contract on a promissory note for $600, made by the defendant, dated July 4, 1857, and payable in one year after date to the order of one Joseph Lambrite and by him indorsed. The defendant in his answer denied the making and indorsement of the note declared on: but admitted that he signed such a note; and averred that he put it into the hands of third parties to be delivered to Lambrite, on the happening of contingencies which never did happen; and that neither the defendant nor those parties nor anyone else, by his authority or consent, ever delivered the writing to Lambrite, or to any other person as the defendant's promissory note.

At the trial in the superior court, the plaintiff proved the signatures of the maker and the indorser; and there was evidence that on the sixteenth of July, 1857, the note was in Lambrite's possession and was indorsed and delivered by him to the plaintiff as collateral security for the payment in six months of $2,000, of which $900 was still due

from Lambrite to the plaintiff at the time of the trial, and that the plaintiff took the note without any knowledge of the circumstances under which it had been given.

Rockwell, J., allowed the defendant to introduce evidence of the facts alleged in his answer, against the objection of the plaintiff that they would constitute no defense to the action unless proved to have been known to the plaintiff when he took the note, and instructed the jury:

> That if they should find that the writing copied in the declaration was never delivered by the defendant, or any person authorized by him so to deliver it, to the payee, or to any person for his use, but that he obtained possession of it without the assent or knowledge of or authority from the defendant, and, having obtained such possession without right or authority, put his name upon the back of it and delivered it to the plaintiff, then and in that case it never became the negotiable note of the defendant, and the defendant was entitled to their verdict.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

Bigelow, C. J. The defendant proved no facts at the trial which constituted a valid defense to the note declared on as against the plaintiff, who is a bona fide holder for value without notice. The rule is well settled, that when a note is transferred by a party to whom it is intrusted without authority or fraudulently, it will be valid as against the maker in the hands of a holder who takes it bona fide without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case, the maker or indorser who places it in the hands of another, for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and cannot refuse to pay it to any bona fide holder into whose hands it may come. Chitty, *Bills* (10th ed.), 198. *Sweetser* v. *French*, 2 Cush. 309. It is undoubtedly true that, as between the original parties to a note or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a bona fide holder. In such case a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of *Putman* v. *Sullivan*, 4

Mass. 45, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practiced on him, or by voluntary violation of the trust reposed in him, must be deemed in law, as against a bona fide holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond, or other instrument, placed in the hands of a third person as an escrow; to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it bona fide without notice. It therefore makes the consequences, which follow from the negotiation of promissory notes and bills of exchange through fraud, deception, or mistake of these persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value without notice.

Exceptions sustained.

QUESTIONS

1. What instructions were given by the lower court to the jury? What instructions should have been given?
2. M makes a promissory note payable to P and leaves it on his desk. P takes the note without M's consent and sues on it. What decision?
3. In the foregoing case, P indorsed it to H. H sues M on the note. What decision?
4. M makes a note payable to bearer and loses it. T finds it and brings an action against M on it. What decision?
5. In the foregoing case, T sells the note to H. H brings an action on it against M. What decision?
6. M signs his name on a blank page of paper. T draws a promissory note above the signature, payable to himself or order, and indorses it to H. H sues M on it. What decision?
7. M, intending to make a gift to P, executes and delivers a note, promising to pay P or order the sum of $500. P sues on the note. M contends that the promise is not enforcible because not supported by a consideration. What decision?
8. What is the effect of placing a seal on an instrument otherwise regular and complete as a bill of exchange or promissory note?

9. Is the date of execution necessary to the validity of a negotiable instrument? What is the effect of delivering an undated instrument?
10. Is it necessary to the validity of a negotiable instrument that the place of payment be stated? If the place of payment is not stated, at what place is the instrument payable?
11. What is the effect of postdating or antedating a bill or note?
12. On January 1, 1922, M executes the following undated note: "Ninety days after date, I promise to pay to the order of P the sum of $300." Without M's knowledge or consent, P dated the check as of November 1. What are the rights of P on the note?
13. In the foregoing case, P indorsed the note to H. On February 5, H sues M on the note. M contends that the action is prematurely brought. What decision?
14. Suppose that a conflict arises between written and printed provisions of a negotiable instrument which prevail? Why?
15. Summarize the provisions of the N.I.L. on the formal requisites of negotiable contracts?

JARVIS *v.* WILSON

46 Connecticut Reports 90 (1878)

Assumpsit against the defendant as acceptor of an order drawn on him in favor of the plaintiff, brought to the Court of Common Pleas of Hartford County, and tried by the court on the general issue before McManus, J. Facts found and judgment rendered for the plaintiff. Motion in error by the defendant. The case is fully stated in the opinion.

Loomis, J. On the eighth of July, 1874, one William Murphy owed the plaintiff $189.20, and drew his order on the defendant in favor of the plaintiff in writing as follows:

Mr. A. M. Wilson. Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me.

William Murphy.

Murphy, who was then and had been for some time in the employ of the defendant, had been authorized by the latter to draw orders in favor of his workmen, of whom the defendant knew the plaintiff to be one.

The foregoing order was duly presented for acceptance to the defendant on the same day that it was given, and the defendant said it was good, and verbally promised to pay it. It afterward appeared that there was in fact due from the defendant to the

drawer only $144.94, and thereupon the defendant refused to pay the plaintiff as he had before agreed. The court below upon these facts held the defendant liable for the full amount of the order. We think the judgment must stand against all the objections urged in behalf of the defendant.

The defendant claims, *in limine*, that his undertaking cannot be regarded as subject to the rules applicable to bills of exchange, but must be treated as a mere promise to pay money. But we do not see why it does not contain every essential element of the most approved definition of a bill of exchange. It is a written order from Murphy, addressed to the defendant, requesting him to pay the plaintiff a certain sum of money therein named. 1 Bouvier's Law Dict., *Bill of Exchange;* Byles on *Bills*, 57; Story on *Bills*, sections 3, 37, 40; Edwards on *Bills and Notes*, 150; *Eastern R.R. Co.* v. *Benedict*, 15 Gray, 292; *Kendall* v. *Galvin*, 15 Maine, 131; *Michigan Ins. Co.* v. *Leavenworth*, 30 Verm. 12.

But conceding the order to be a bill of exchange, the defendant further claims that he is not liable, because his acceptance was only by parol, when it should have been in writing.

It is true, as a general rule, that to make one liable as a party to a bill or note his name should appear thereon, under his own hand or that of his agent. A wise policy may also require that the liability of an acceptor should not depend on parol evidence and, recognizing this, some states have already changed the rule of the common law as to an acceptor of a bill of exchange. In New York it is required by statute that the acceptance should be in writing, and there is a similar statute in England as applicable to an inland bill. But where there is no statute to control, the rule is quite general, both in England and in the United States, that an acceptance of a bill of exchange may be by parol. 1 Swift, *Digest*, 424; Story on *Bills*, sections 242, 243, 246; 1 Parsons on *Contracts*, 267; Edwards on *Bills and Notes*, 409; *Dunovan* v. *Flynn*, 118 Mass., 509; *Spaulding* v. *Andrews*, 48 Penn. S. R. 411.

The statute of frauds does not apply to such an undertaking. One reason may be that the acceptor is regarded as the primary debtor, and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

But in this case the defendant relies on the fact that when he accepted the bill he had not in his hands sufficient funds of the drawer

to pay the amount required, and contends that the acceptance should therefore either be considered within the statute, or should be held void for want of consideration. This objection ignores the fundamental principle that the acceptance admits everything essential to the validity of the bill, and that want or failure of consideration cannot be shown in a suit by the payee against the acceptor. The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defense against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he owed the drawer that amount. This was exclusively within his knowledge, but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer sufficient to make good the accetpance. *Fisher* v. *Beckwith*, 19 Verm. 31; *Arnold* v. *Sprague*, 34 *id.* 402; *United States* v. *Bank of Metropolis*, 15 Pet. 377; *Grant* v. *Ellicott*, 7 Wend. 227; *Hoffman* v. *Bank of Milwaukee*, 12 Wall. 181; Parsons on *Notes and Bills*, 343; 1 Daniels on *Negotiable Instruments*, 135.

There is no error in the judgment complained of.

QUESTIONS

1. What is meant by the acceptance of a bill of exchange? What is the effect of an acceptance of a bill according to its tenor? What bills may be accepted? What bills must be accepted?
2. Who may accept a bill of exchange? What is meant by the *acceptance of a bill for honor?* Under what circumstances may such an acceptance be made? What is the effect of such an acceptance?
3. What was the kind of acceptance under consideration in the principal case?
4. What can be said in defense of such an acceptance? What objections may be urged against it?
5. "The statute of frauds does not apply to such an undertaking." What portion of the statute of frauds is referred to by this statement? Why does it not apply?
6. Why was the drawee, in the principal case, not permitted to show that when he accepted the bill he did not have in his hands sufficient money of the drawer to pay the amount of the order?
7. D draws a bill upon A in favor of P. P presents it for acceptance. A tears the instrument up and throws it in the waste basket. P sues A as an acceptor. What decision?

8. In the foregoing case A retains the bill for a week without accepting it. P sues A as acceptor of the bill. What decision?
9. How would the principal case have been decided under the N.I.L.? How would you answer questions 7 and 8 under the N.I.L.?

SPEAR *v.* PRATT

2 Hill's New York Reports 582 (1842)

Assumpsit, tried at the Onondaga circuit, in September, 1841, before MOSELEY, C. JUDGE. The action was against the defendant, Frederick Pratt, as acceptor of a bill of exchange, payable to the order of the plaintiffs. The defendant's name was written across the face of the bill; and the question was whether this was such acceptance as is required by the statute. It was admitted that the defendant, at the time of the acceptance, was a resident of this state. His counsel insisted at the trial that the acceptance was insufficient to charge him, but the circuit judge being of a different opinion, directed the jury to find for the plaintiffs, which they accordingly did; and the defendant's counsel, having excepted, now move for a new trial upon a bill of exceptions.

COWEN, J. Any words written by the drawee on a bill, not putting a direct negative upon its request, as "accepted," "presented," "seen" the day of the month, or a direction to a third person to pay it, is prima facie a complete acceptance, by the law merchant. (Bayley on *Bills*, 163, Am. ed. of 1836, and the cases there cited.) Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance—a signing by the drawee. "It may be," says Chitty, "merely by writing the name at the bottom or across the bill"; and he mentions this as among the more usual modes of acceptance. (Chitty on *Bills*, 320, Am. ed. of 1839.)

It is supposed that the rule has been altered by 1 R. S. 757 (2d ed.) section 6. This requires the acceptance to be in writing and signed by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a *writing* and *signing*. The statute contains no declaration that it should be considered less. An indorsement must be in writing and signed; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular

place, and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored paraphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee's name—the word *accepted*, at least. That may be so, but it is enough for us to see that both the term and the spirit of the act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

New trial denied.

QUESTIONS

1. What, in the opinion of this court, is necessary as an acceptance of a bill of exchange?
2. What would have been the decision of the court under the N.I.L.?
3. D draws a bill on A to the order of P. P presents the bill to A for acceptance. A writes across the face of the bill: "How are you?" and signs his name to it. Is this a sufficient acceptance within the rule laid down by the principal case? Would it be a sufficient acceptance under the N.I.L.?
4. D draws a bill on A in favor of P. A refuses to accept the bill when it is presented for that purpose. What are the rights of H on the instrument?
5. D has money in the B Bank. He draws a check on it in favor of P. The bank refuses to pay the check. P sues the bank on the check. What decision?
6. D draws a bill on A in favor of P. P presents the bill to A for acceptance. A is willing to give H a written acceptance but is not willing to place it on the bill. H notifies D that A has dishonored the bill and brings an action on it against D. What decision?
7. D draws a bill on A in favor of P which A accepts. A refuses to pay it at maturity. P sues him on his acceptance. A contends that he is not liable because there was no consideration for his promise. What decision?

COOLIDGE *v.* PAYSON

2 Wheaton's United States Reports 66 (1817)

MARSHALL, C. J. This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall against Coolidge & Co., as the acceptors.

A verdict was given for the plaintiffs and judgment rendered thereon, which judgment is now before this court on a writ of error.

The question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans & Rose* v. *Van Mierop & Hopkins* (3 Burr, 1663) the credit on which the bill was drawn was given before the promise to accept was made and the promise was made previous to the existence of the bill. Yet in that case, after two arguments and much consideration, the Court of King's Bench (all the judges being present and concurring in the opinion) considered the promise to accept as an acceptance.

Between this case and that under the consideration of the court, no essential distinction is perceived. But it is contended, that the authority of the case of *Pillans & Rose* v. *Van Mierop & Hopkins* is impaired by subsequent decisions.

In the case of *Pierson* v. *Dunlop et al.* (Cowp. 571) the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield in delivering his opinion contradict those laid down in *Pillans & Rose* v. *Van Mierop & Hopkins*. His lordship observes, "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of *Pillans & Rose* v. *Van Mierop & Hopkins* had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of *Pierson* v. *Dunlop* certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances, to which Lord Mansfield alludes, must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with circumstances;" but it is not said that the answer must contain these circumstances. In the case of *Pierson* v. *Dunlop*, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it give credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason* v. *Hunt* (Doug. 296) Lord Mansfield said:

> There is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept this bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor.

What is it that "the drawer or any other person may show upon the exchange"? It is the promise to accept—the naked promise. The motive to this promise need not, and cannot, be examined. The promise itself, when shown, gives the credit, and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglas are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans* v. *Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives

such a bill in payment of a debt will be prevented thereby from taking other means to obtain the money due him. Any ingredient of fraud would unquestionably affect the whole transaction, but the mere circumstances that the bill was taken for a pre-existing debt have not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another* v. *Collins* (1 East 98), Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnson* v. *Collins*, the promise to accept was in a letter to the drawer and is not stated to have been shown to the indorser. Consequently the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance, but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Lord Mansfield in the case of *Pierson* v. *Dunlop*; and Lord Kenyon said, that "This was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clark and others* v. *Cock* (4 East. 57), the judges again express their dissatisfaction with the law as established and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter to be a virtual acceptance. It is true, in the case of *Clark* v. *Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise, but no case has been decided on this distinction, and in *Pillans and Rose* v. *Van Mierop and Hopkins*, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterward.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of the opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the letter, a virtual acceptance binding a person who makes the promise. This is such a case. There is therefore no error in the judgment of the circuit court, and it is affirmed with costs.

Judgment affirmed.

QUESTIONS

1. What was the character of the acceptance which was under consideration in the principal case?
2. What facts must be shown by the holder of an instrument to sustain the validity of an acceptance like the one discussed in this case?
3. What is the justification for the doctrine of the principal case?
4. D writes to A, stating that he has drawn a bill on him to the order of P for $300 and asking A whether he will accept the bill when presented. A replies that he will. In reliance on the two letters, P takes the bill. What decision in an action by P against A on the bill?
5. P indorses the bill to H. (*a*) H, at the time he takes the bill, knows nothing of A's willingness to accept. (*b*) H takes the bill in reliance on P's statement that A had expressed his intention to accept. (*c*) H takes the bill in reliance on A's letter, stating that he would accept. H sues A as acceptor of the bill. What decision under each hypothesis?
6. A writes to D, promising to accept such bills as D may draw on him. D draws a bill on A to the order of P. P takes the bill in reliance upon A's letter. What decision in an action by P against A as acceptor of the bill?
7. A, by letter, promises D that he will accept a bill to be drawn payable to P in the sum of $500. Ten days later, D draws the bill and P takes it in reliance upon A's letter. P is suing A on the bill. What decision?
8. In the foregoing case, P indorses the instrument to H who is unaware of the letter of A. What decision in an action by H against A as acceptor?
9. A orally promises D that he will accept a bill drawn on him in favor of P for $300. D draws the bill. P takes the bill in reliance on A's promise which he heard made. What decision in an action by P against A as acceptor of the bill?
10. What provisions are contained in the N.I.L., governing situations like the ones in the foregoing questions?

GIBSON *v.* SMITH

75 Georgia Reports 33 (1885)

BLANDFORD, J. The defendant in error brought his action upon the following instrument in writing:

Augusta, Ga., January 30, 1882

Mr. W. M. Dunbar, secretary and treasurer: You will please pay to A. N. Porter, Esq., four hundred dollars, balance due me for wages by Steamer W. T. Wheless and owners, and this shall be your receipt.

(Signed) W. T. GIBSON.

Across the face was written, "Accepted, when funds in hand. W. M. Dunbar, Sec. and Treas."

There was evidence submitted, going to show that the Miners' & Planters' Transportation Company, of which Dunbar was secretary and treasurer, owed Gibson four hundred dollars for wages as captain of the steamer Wheless; that Gibson made the draft and delivered the same to Porter, and that Porter procured the acceptance for his own convenience, and without the knowledge and consent of Gibson.

Where a draft is given, directing the drawee to pay absolutely a sum of money to the payee, it is the right of the payee to have an unconditional and unqualified acceptance of the same; and if he chooses, without the consent of the drawer, to take a conditional, limited, or qualified acceptance of the draft, he thereby releases the drawer from all liability on the draft. See 1 Daniel, *Negotiable Instruments*, section 510; Chitty on *Bills*, 340; Byles on *Bills*, 316; Story on *Bills*, section 204.

We think the non-suit moved for in this case should have been granted. When the payee took an acceptance different from the tenor of the bill, without the consent of the drawer, he could not recover against the drawer. The drawer was merely a surety for the acceptor, he being an acceptor for value, and not an accommodation acceptor, and taking a conditional, varying, or qualified acceptance by the drawee, without the consent of the drawer, was to his injury; he had a right to have notice of any change by the drawee in the tenor of the bill, and if he did not consent thereto, he is discharged.

Judgment reversed.

QUESTIONS

1. The acceptance in the principal case was clearly not according to the tenor of the bill. Does such an acceptance destroy the negotiability of the bill?

2. Suppose that Dunbar had not accepted the instrument in any form, what would have been the rights of the holder against Gibson?
3. What were the rights of the holder against Dunbar under the circumstances stated in this case?
4. D draws a bill on A payable to the order of P, payable "sixty days after date." P indorses the instrument to Q. Q presents it to A for acceptance. A accepts the instrument to be paid "ninety days after date." Q indorses the bill to H. At maturity, what are the rights of H against A? against D? against P? against Q?
5. D draws a bill on A payable to the order of P in the sum of $1,500. P indorses the bill to Q. Q presents it for acceptance. A accepts for $1,000. Q indorses the bill to H. What are the rights of H against A? against D? against P? against Q?
6. A, for D's accommodation, accepts a bill drawn by D to the order of P, payable on demand. P indorses the bill to Q. Q presents it for acceptance. A accepts in this manner: "I will pay the bill within thirty days from date." Q indorses the instrument to H. What are the rights of H on the bill against A? against D? against P? against Q?
7. D draws a bill on A payable to the order of P. P presents it to A for acceptance who accepts "payable in merchantable goods." P indorses it to H. What are the rights of H against A? against D? against P?
8. What is a general acceptance? a conditional acceptance? a partial acceptance? an acceptance qualified as to time?
9. To what kind of an acceptance is a holder of a bill entitled? If he does not get the kind to which he is entitled, what may he do?
10. Summarize the provisions of the N.I.L. on acceptance of bills of exchange.

c) *Transferability of Negotiable Contracts*

I. MODES OF TRANSFER

PEACOCK *v.* RHODES

2 Douglas King's Bench Reports 633 (1781)

In an action upon an inland bill of exchange, which was tried before Willes, Justice, at the last spring assizes for Yorkshire, a verdict by consent was found for the plaintiff, subject to the opinion of the court, on a special case, stating the following facts:

The bill was drawn at Halifax, on the 9th of August, 1780, by the defendants, upon Smith, Payne & Smith, payable to William Ingham, or order, 31 days after date, for value received. It was indorsed by William Ingham, and was presented by the plaintiff for acceptance and payment, but both were refused, of which due notice was given by the plaintiff, to

the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at Scarborough, received the bill from a man not known, who called himself William Brown, and by that name, indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at Scarborough, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. William Ingham, to whom the bill was payable, indorsed it, John Daltry received it from him, and indorsed it, Joseph Fisher received it from John Daltry; and it was stolen from Joseph Fisher at York (without any indorsement or transfer thereof by him), along with other bills in his pocketbook, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of Ingham.

LORD MANSFIELD. I am glad this question was saved, not for any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps in the single case (which is a hard one, but has been determined) of a note for money won at play. I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and therefore, the case is clear, and within the principle of all those Mr. Wood has cited, and that of *Miller* v. *Race*, downward to that determined by me at nisi prius.

The *postea* to be delivered to the plaintiff.

QUESTIONS

1. D owes P the sum of $500. What is the nature of the relation between the parties? What is the nature of the claim which P has against D? How will P enforce it?

2. It is said that P, in the foregoing question, has a chose-in-action. What is a chose-in-action? Is it the subject-matter of ownership? If so, what are the elements of ownership in it?
3. Can P sell his ownership in the claim in question 1? If so, how does he sell it and what is the effect of the sale? Does this claim possess a high degree of transferability? Why or why not?
4. M executes a note by which he promises to pay P or order the sum of $500. What is the difference between this claim and the claim involved in question 1?
5. In the foregoing case, can P sell his claim against M? To what extent does this claim possess the quality of transferability?
6. What differences are there between the sale of the claim in question 1 and the sale of the claim in question 5? Why should these differences exist?
7. What is meant by an *order instrument?* How is an order instrument sold?
8. What is meant by a bearer instrument? When is an instrument payable to bearer? How is a bearer instrument sold?
9. Lord Mansfield said in this case: "I can see no difference between a note indorsed in blank, and one payable to bearer. They both go by delivery, and possession proves property in both." What does he mean by these statements?
10. "The general rule applicable to personal property is, that the seller, although in possession of the property, can give no better title than he has. From the operation of this rule negotiable paper is excepted." Why should negotiable paper be excepted from the operation of this rule?
11. Did the thief in this case have any title to the instrument in question? Can he pass a better right to the instrument than he himself has? If so, why?

WHISTLER *v.* FORSTER

14 Common Bench Reports (N. S.) 248 (1863)

This was an action by the indorsee against the maker of a cheque for £95 1. 10*s*. drawn by the defendant payable to A. S. Griffiths & Co., or order, and indorsed by A. S. Griffiths & Co. to the plaintiff.

The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him if the court should be of opinion that the cheque, though postdated and unstamped (otherwise than with the penny stamp imposed by the 21 & 22 Vict. chap. 20, sec. 1), was a valid instrument, and that the

plaintiff had a sufficient interest in the cheque to entitle him to sue upon it before he received notice of the alleged fraud.

ERLE, C. J. This is an action against the drawer of a bill of exchange—for, though in form a cheque, the instrument is for all the purposes of the Stamp Act a bill. The plea is, that the bill was obtained from the defendant by one Griffiths by means of fraud, and that it was indorsed to the plaintiff after he had notice of the fraud. The facts are shortly these: The instrument was a negotiable instrument which had been fraudulently obtained from the defendant by Griffiths, and had been handed over by Griffiths to the plaintiff in part satisfaction of a debt of a larger amount. But Griffiths, at the time he so handed over the bill to the plaintiff, omitted to indorse it. Under these circumstances, the condition of things was this, that the plaintiff had at that time the same rights as if an ordinary chattel had passed to him by an equitable assignment; he would have all the rights which Griffiths could convey to him. Now Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing over the bill to another. According to the law merchant, the title to a negotiable instrument passes by indorsement and delivery. A title so acquired is good against all the world provided the instrument is taken for value and without notice of any fraud. The plaintiff's title under the equitable assignment here, therefore, was to be rendered valid by indorsement; but, at the time he obtained the indorsement, he had notice that the bill had been fraudulently obtained by Griffiths from the defendant and that Griffiths had no right to make the indorsement. Assuming, therefore, that there may be conflicting equities between the plaintiff and the defendant, I think the right should prevail according to the rule of law, and that the plaintiff had no title as transferee of the bill at all.

QUESTIONS

1. Suppose that Griffiths had indorsed the check at the time he sold it to the plaintiff, would the decision in this case have been the same?
2. Could the plaintiff have compelled Griffiths to indorse the check to him?
3. What is the legal effect of a delivery of a bearer instrument to another with an intent to sell it? What is the legal effect of the delivery of an unindorsed order instrument to another with an intent to pass title?
4. What, in the opinion of this court, is the legal effect of the indorsement and delivery to another of a negotiable instrument?
5. In the principal case, the plaintiff secured an indorsement from Griffiths. Why did he not get title to the check free from the defense of the maker?

SMITH *v.* CLARKE

Peake's Nisi Prius Reports 295 (1794)

This action was brought by the plaintiffs as indorsees of a bill of exchange against the acceptor. The bill was indorsed in blank by the payee, and, after several indorsements, it came to one Jackson (whose assignees had indemnified the present defendant) under a special indorsement to him or order. Jackson sent it to Muir and Atkinson, and they discounted it with the plaintiffs, but Jackson had not indorsed it. The plaintiffs had struck out all the indorsements except the first.

Law, for the defendant, objected that this special indorsement had restrained the negotiability of the bill, and that the plaintiffs could not recover without an indorsement by Jackson.

Lord Kenyon. The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement, being made after the payee had indorsed it, cannot affect the title of the present plaintiffs.

Verdict for the plaintiffs.

QUESTIONS

1. What was the issue under consideration in this case? How was the issue decided? What rule of law can be deduced from this decision?
2. Before the indorsements were struck from the instrument in question, who had title to it?
3. What was the source of the plaintiff's title which enabled him to sue the maker?
4. What is meant by a special indorsement? What is the effect of a special indorsement?
5. Suppose that F had found the instrument in the principal case and had struck from it the special indorsement to Jackson, what would have been the decision of the court in an action by F against the acceptor?
6. M makes a note payable to bearer and delivers it to P. P indorses it to Q or order. T steals it from Q and sells it to H. H sues M on the note. What decision?
7. In the foregoing case, H strikes out the special indorsement to Q and sues M on the note. What decision?
8. Does the N.I.L. change the rule laid down in *Smith* v. *Clarke?* (See sec. 9, par. 5, and sec. 40.)

HAINES *v.* DUBOIS

30 New Jersey Law Reports 259 (1863)

The issue in this case was tried at the Salem Circuit, and a verdict rendered for the plaintiff. The defendant seeks to have the verdict set aside, and a new trial granted, because he was not an indorser of the note sued on, and if an indorser, he had no sufficient notice of non-payment.

WHELPLEY, C. J. The only question made upon the argument was whether Dubois, who was sued as indorser of a note, was duly notified of its dishonor.

The note was made by John W. Wright, payable to the order of Dubois, to secure a debt which he owed to one Thomas Newell. He agreed to give security for the delay of eight months, the time the note had to run, and took the note so made away with him, and brought it back with the name of Dubois written under that of Wright, the maker. It did not appear upon the trial that Dubois refused to indorse the note, but was willing to be a joint maker; no evidence was given to show why he did not indorse his name, as usual, on the back, instead of writing it, as he did, on the face. Dubois was sworn upon the trial, and did not pretend that he did not intend to indorse the note. He knew that the note was payable to his order, and could not be negotiated without his indorsement, and with this knowledge put his name upon it. It was a sufficient indorsement.

If the payee write his name on any part of the note with the intention of indorsing it, it is a sufficient indorsement. An indorsement, as the word imports, is usually put upon the back of a note; that is the regular mode, but the place where written is by no means essential. *Partridge* v. *Davis*, 20 Vermont, 499–503.

In *Rex* v. *Biggs*, 3 P. Wms., 419–28, it was held, under a statute making it a felony to alter or raise an indorsement on a bill or bank note, that a defendant who had erased with lemon juice a receipt for part payment written on the face of a bank note, was properly convicted under the act for erasing an indorsement.

This is much like the question of how the indorser's name must be written. It has been held that a writing in pencil is sufficient; so an indorsement by initials, and even by figures, has been held good. *Brown* v. *Butchers Bank*, 6 Hill, 443, and cases there cited. *Merchants Bank* v. *Spicer*, 6 Wend. 445. The true rule is stated by NELSON, C. J., in the case cited from 6 Hill, 443, that a person

may become bound by any mark or designation he thinks proper to adopt, provided he uses it as a substitute for his name, and he intends to bind himself. For the same reason, the place where the name of maker or designation is put is not material, if the signer intended it as an indorsement.

The notary, misled by the place in which he found Dubois' signature, sent notice to him as the maker of the note. This notice Dubois, on the trial, admitted he had received, and did not deny that he was fully apprized by it that the note was duly presented for payment at the Salem Bank, where it was payable, payment demanded of the maker and refused. A short time before the note became due he called upon the plaintiff, to whom Newell transferred it when made, asked to see it, saw it, and remarked that it was correct.

He was not indorser upon any other note at the time with which this might have been confounded. In short, the case leaves no room for doubt that he was fully apprized by the notice of the dishonor of the note, and by fair implication, that he was looked to for payment. The notice, in fact, answered all the purposes for which a notice is required, to be sent to an indorser. This was held sufficient in *Howland* v. *Adrian*, decided at June Term, 1862.

The verdict was right upon the evidence, and there should be judgment for the plaintiff.

QUESTIONS

1. What is an indorsement? What is the legal effect of it?
2. Where is an indorsement usually placed on the instrument? Where should it be placed?
3. Must an indorsement be signed by the indorser? Must it be dated? Is an indorsement written in pencil sufficient?
4. Are one's initials sufficient as an indorsement? Is a trade name sufficient? Is a mark or symbol sufficient?
5. What negotiable instruments must be indorsed? May a bearer instrument be indorsed? What is the effect of an indorsement on a bearer instrument?
6. Action by H against Q as an indorser of a promissory note. Q contends that H cannot recover because there was no consideration for the indorsement. What decision?
7. Action by H against M as the maker of a note. M contends that H cannot recover because H furnished no consideration to P for the indorsement. What decision?
8. What provisions are found in the N.I.L. relating to the formal requisites of an indorsement?

SEARS *v.* LANTZ

47 Iowa Reports 658 (1878)

Action against the defendants Lantz and Bates as makers, and John Bowman as indorser of a negotiable promissory note. A demurrer having been sustained to so much of the petition as sought to charge Bowman as indorser, the plaintiff appeals.

Seevers, J. The note was payable to the defendant Bowman or order, and he wrote on the back thereof the following: "December 18, 1876, I hereby assign all my right and title to Louis Meckley. John Bowman." The ground of demurrer was in substance that no cause of action existed against the defendant, Bowman, under and by virtue of the said writing. Without doubt it amounts to an assignment of all the defendant's right and title in the note. Does this subject him to the liabilities of an indorser, is the question for determination. An indorsement differs from an assignment in that an indorsee may bring the action in his own name and an assignee cannot. 2 Parsons on *Notes and Bills*, 1.

It was held in *McCarty* v. *Clark*, 10 Iowa, 588, that the assignment of a promissory note as collateral security for the payment of another debt passed the title to the indorsee, and that he could sue in his own name without averring or showing that the indebtedness secured by the note had been paid.

In *Childs* v. *Davidson*, 38 Ills. 438, it was held that "I guarantee the payment of the within note" amounted to an assignment, and transferred the legal title to the note so as to enable the holder to maintain an action against the maker. See also *Rowe* v. *Waines*, 15 Ind., 445.

In *Sands* v. *Wood*, 1 Iowa, 263, it was held the words, "I assign the within note to Miss Sarah Coffin" amounted to an indorsement, and the party so transferring the note became liable as an indorser.

The effect of the assignment in *Sands* v. *Wood* was to assign and transfer whatever title the assignor had in the note. He used no words that in and of themselves indicated that he bound or made himself liable in case the maker after demand failed to pay the note. But it was held that the law as a legal conclusion attached to the words used the liability that follows the indorsement of a promissory note.

It will be difficult, we apprehend, to draw a distinction between that case and the one at bar. Here the defendant assigned all his

right and title in the note, and this in legal contemplation was the effect of the assignment in *Sands* v. *Woods*.

In neither case was there any limit attached to the liability of the assignor that resulted as a legal conclusion. It must be regarded as settled in this state that the assignment of a promissory note by the payee thereof, in writing on the note, vests the legal title therein in the assignee so as to enable him to bring an action in his own name against the maker. Such being true, an assignment amounts to an indorsement, within the rule laid down by Parsons cited above.

The result is that the demurrer should have been overruled.

Reversed.

QUESTIONS

1. What difference did it make in the principal case whether the instrument was negotiated or assigned?
2. What are the differences in legal consequences between assignment and negotiation?
3. P, payee of a promissory note, writes on the back, "I assign the within to Q." What is the effect of this?
4. P writes on the back of a note: "I guarantee the within," and delivers it to H. H sues M, the maker. What decision?
5. P indorses a note as follows: "Pay to Q." Q indorses it to H. H sues M on the note. M contends that H is a mere assignee and not entitled to sue in his own name. What decision?

CLAFLIN *v.* WILSON

51 Iowa Reports 15 (1879)

Action in chancery. There was a decree in the district court granting the relief prayed for by plaintiff. Defendant Davis appeals. The facts of the case appear in the opinion.

Beck, C. J. The petition alleges that defendant Wilson made to plaintiff three promissory notes, and executed a mortgage to secure their payment; that the note first falling due was by plaintiff, in the ordinary course of business, indorsed for collection, and by Wilson, or by someone for him, duly paid, and that defendant Davis, claiming that he had bought the first note, instituted an action to foreclose the mortgage and recovered a decree thereon, and caused the lands to be sold upon an execution. He and his attorney in the case became purchasers, and received a certificate of purchaser from the sheriff. Plaintiff alleges that he did not transfer the note to Davis nor authorize anyone to do so for him, and had no knowledge of his claim until

about the time this suit was commenced, and that Wilson is now insolvent. The relief prayed for is that the foreclosure proceedings on the note and the sale thereunder be set aside, and that the mortgage be foreclosed for the amount due upon the two notes last falling due, which are still plaintiff's property.

The answer of defendant Davis admits the foreclosure proceedings referred to in the petition, and alleges that he bought the note in good faith and for value. Other averments of the petition are denied.

The evidence establishes the following facts: Plaintiff sent the note through a bank to another banking house for collection. It was indorsed by plaintiff in blank, and by the bank to whom he delivered it to the bank receiving it "for collection." Neither of these banks was authorized to transfer the note; their power was limited to its collection. The second bank or its successor in business received the amount due upon the note from Davis, and delivered to him the note. Davis understood the transaction as being a purchase of the note, and the banker of whom he received it had the same understanding. But Davis is chargeable with notice that the banker with whom he had the transaction was not authorized to transfer or sell the note. The indorsement upon it expresses that it was transferred to him for collection. The law will not permit him to plead ignorance of the extent of the authority of the holder who delivered it to him. Upon this point there can be no controversy.

It is an elementary rule, which need not be here supported by authority, that a note indorsed for collection cannot be transferred by one receiving it under such indorsement to another who has notice of the limitation upon the authority of the holder. Davis cannot, therefore, be regarded as a purchaser of the note, so as to cut off any right or equity of plaintiff.

We think the decree of the court below is correct.

Affirmed.

QUESTIONS

1. What was the nature of the indorsement which the plaintiff made on the promissory notes in controversy in this case? What did the indorsee get by the indorsements in question?
2. P is the holder of a check made by D. He indorses it to Q "for collection and deposit." Q indorses the check to H. What are the rights of H against P on the instrument?
3. P indorses a bill to Q for collection. How does Q hold the money when he collects it?

4. P indorses a bill to Q for collection. Q presents the bill to the drawee for payment and payment is refused. Q gives proper notice to P of the dishonor of the instrument and brings an action against him on the bill. What decision?
5. M makes a note payable to P or order. P indorses it, "Pay to Q." Q indorses it to H. H sues M on the note. What decision?
6. In the foregoing case, P indorses it, "Pay to Q only." Q indorses it to H. H sues M on the note. What decision?
7. P indorses a note, "Pay to Q for the use of C." Q indorses and delivers the note to H in payment of a debt which Q owes H. What are C's rights under the circumstances?
8. What is meant by a special indorsement? a restrictive indorsement? What is the effect of each?
9. What is an indorsement in blank? What is the effect of such an indorsement?

WATSON *v.* CHESIRE

18 Iowa Reports 202 (1865)

DILLON, J. The case presents the question, What, in the absence of special contract, are the obligations of the transferrer of negotiable paper, who indorses it without recourse? It seems to us that the obligations of a transferrer of such paper, by indorsement without recourse, are substantially the same as those of a transferrer of such paper when payable to bearer by delivery merely.

It is a clear and well settled doctrine, that such a transfer does not make the party liable as indorser. When he indorses paper without recourse, or transfers it (if payable to bearer or if indorsed in blank) by delivering merely, without putting his name upon it, he ceases to be a party to the paper. He cannot be made liable as a party to or upon the instrument.

There may be a liability in such cases, but it arises upon the transaction, upon the facts of the case, to be asserted in an action for the original consideration, its value, or for fraud practiced, and not upon the indorsement or upon the paper transferred. Speaking of the same general subject in the well-known case of *Jones* v. *Ryde*, 1 Marsh. 157; 5 Taunt. 489, GIBBS, C. J., says: "The ground of resisting this claim is, that it was a negotiable security without indorsement; and that when the holder of a negotiable security passes it away, without indorsing it, he means not to be responsible upon it." This doctrine was fully discussed in the case of *Fenn* v. *Harrison*, 3 T.R. 757; and the proposition is true, but only to a certain extent. "If

a man pass an instrument of this kind without indorsing it, he cannot be sued as indorser, but he is not released from the responsibility which he incurs by passing an instrument which appears to be of greater value than it really is." And this case is recognized as authority in the textbooks, and in England in subsequent cases (*Wilkinson* v. *Johnson*, 3 B. & C. 428), and in this country. (*Cabot Bank* v. *Morton*, 4 Gray, 156.)

The accepted doctrine on this subject may be thus stated: Where a note is transferred without recourse, equally as when it is transferred by delivery only, the transferrer is exempted from all the ordinary responsibilities which attach to such a transfer. But he does not, unless such is the agreement, understanding, or contract of the parties, stand free from all obligations. Thus, unless otherwise agreed, he warrants that the paper so transferred is genuine, and not forged or fictitious. *Jones* v. *Ryde, supra; Fuller* v. *Smith, Ryan & Mood.*, 49; 1 C. & P. 197; Chitty on *Bills*, 245; Story on *Notes*, section 118; *Aldrich* v. *Jackson*, 1 R.I. 218; 2 Parsons on *Notes and Bills*, chapter 2, section 2, page 37, and authorities; *Lyons* v. *Miller*, Gratt. 247; *Morrison* v. *Currie*, 4 Duer, 79; *Cabot Bank* v. *Morton, supra, Rieman* v. *Fisher*, 4 Am. Law Reg. 433. He warrants by implication, nothing to the contrary being shown, that it is the kind and description that it purports on its face to be. *Allen* v. *Pegram*, 16 Iowa, 163, in relation to illegal bank stock; *Gomperts* v. *Bartlett*, 2 Ellis & Bl. 849, 24 Eng. L. & Eq. 156, where the vendor of a bill was held liable, though he did not put his name upon it. *Young* v. *Cole*, 3 Bing. N.C. 724, as to liability of vendor on the sale of invalid Guatemala bonds; and see further, the authorities referred to above; and *Kempson* v. *Sanders*, 11 Bing., 5; Redfield on *Railways*, 50, note; Hilliard on *Sales*, page 456, section 37; *Eaton* v. *Mellin*, 7 Gray, 566, which decides that there is an implied warranty that the assignor has done nothing, and will do nothing, to prevent the assignee from collecting the claim assigned.

So there is an implied warranty, unless it is otherwise agreed, that the parties to the instrument are *sui juris*, and capable of contracting. *Theall* v. *Newell*, 19 Verm. 202; *Lobdell* v. *Baker*, 1 Metc. 193, 3 *id.*, 469; *Jones* v. *Crosthwaite*, 17 Iowa, 393, and cases; 2 Parsons on *Notes and Bills*, 39; but no implied warranty of their solvency. Chitty on *Bills*, 245; 2 Parsons on *Notes and Bills*, 41; *Epler* v. *Funk*, 8 Penn. 468; *Burgess* v. *Chapin*, 5 R.I. 225. So there is an implied warranty that the instrument transferred has not

been paid. And, generally, it is laid down by Mr. Parsons, 2 *Notes and Bills*, chapter 2, page 41, who follows and closely copies Mr. Chitty on *Bills*, 247, that, "in all cases where the assignor" (we may add whether by delivery or by indorsement, made without recourse), "of a bill or note knows it to be of no value, and the assignee receives it in good faith (not aware of the fact), paying a valuable consideration of any kind, the assignor may be compelled to repay or return the consideration thus received." And see *Burgess* v. *Chapin*, 5 R.I. 225, which holds an assignor without indorsement to be liable upon the ground of fraud—the rule of *caveat emptor* otherwise applying.

QUESTIONS

1. What kind of indorsement was under consideration in the principal case? What is the effect of such an indorsement? What words are necessary to constitute this indorsement?
2. Does a person who indorses in this manner relieve himself of all his responsibility as a seller of the instrument? What part of a seller's responsibility does he relieve himself of?
3. What are the legal consequences of a general indorsement? Of an indorsement *sans recourse?*
4. P indorses a note "without recourse" to Q. Q indorses generally to H. M refuses to pay the note at maturity because of his infancy. H gives proper notice to P of the dishonor of the note. He brings an action against P, (*a*) as an indorser, (*b*) upon his implied warranty that the maker of the note was *sui juris*. What decision on each count?
5. What would be your answer in the foregoing question, in case Q were suing P on his implied warranty that the maker of the note was *sui juris?*
6. Enumerate the various implied warranties which an indorser *sans recourse* makes.
7. P is the holder of a bearer instrument. He sells and delivers it to Q. Q sells and delivers it to H. At maturity M refuses to pay the note. (*a*) What are H's rights against Q? (*b*) What are his rights against P?

SMALLWOOD *v.* VERNON

1 Strange's Reports 478 (1721)

The indorser cannot lay a charge upon the giver of the note in a manner different from the terms of it; but he may charge himself if he pleases, for every indorsement is the same as making a new note; and if the note be payable May 1, and the indorsement appoints it to be payable April 1, as to the indorser it is a note payable April 1.

QUESTIONS

1. M executes a note payable sixty days after date. P, the payee, indorses the note to Q. Q indorses to H in this manner, "Pay the within to H or order thirty days after date." What are the rights of H against M on this note? What are his rights against Q on it?
2. P indorses a bill in this manner: "Pay the within to the order of Q upon my name appearing in the London Gazette as killed in action." Q indorses generally to H. What are H's rights against Q on the bill? What are his rights against A on it?
3. D draws an order on A directing him to pay to P or order the sum of $1,500. A accepts the bill. P indorses the bill as follows: "Pay to Q $500, to R $500, and to H $500." H sues A on the bill for $500. What decision?
4. M makes and delivers a note, payable to P or order. T steals the note and forges an indorsement to Q. Q indorses it to H. What are H's rights on the note against Q? against P? against M?

BROMAGE *v.* LLOYD

1 Exchequer Reports 32 (1847)

Pollock, C. B. This is an action on a promissory note, upon which the payee has written his name, and after his death his executrix delivered the note to the plaintiffs without indorsing it, so that there is a writing of his name by the deceased, and a delivery by his executrix. These acts will not constitute an indorsement of the note: the person to whom it was delivered has no right to sue upon it.

Alderson, B. The promissory note was made payable to the testator, "or order," that means order in writing. The testator has written his name upon the note, but he has given no order; the executrix has given an order, but not in writing. The two acts being bad, do not constitute one good act.

Rolfe, B. The word "transfer" means indorsement and delivery.

Judgment for the defendant.

QUESTIONS

1. Why was there not a sufficient indorsement to pass title to the instrument under consideration in the principal case?
2. At the time the payee wrote his name on the note, in whom was the title to the instrument? In whom was the title, at the time the executrix delivered the note to the plaintiffs?

3. M executes a note to P or order. P places an indorsement to Q on the note and leaves the instrument in his desk. Q takes the note from the desk without P's knowledge. M refuses to pay the note. Q sues P as indorser. What decision?
4. In the foregoing case, P loses the note. Q finds it and brings action against P as an indorser. What decision?
5. In question 3, Q indorses the note to H. M refuses to pay the note at maturity. H sues P as indorser of the note. What decision?

MOORE *v.* CROSS

19 New York Reports 227 (1859)

Appeal from the Supreme Court. The complaint averred the making of a promissory note by the defendant, McGervey, payable to the order of the plaintiff, and that it was indorsed by the defendant Cross for the purpose of paying for coal sold and delivered by the plaintiff to McGervey on the credit of such indorsement, and was delivered, thus indorsed, to the plaintiff, with the privity of Cross in payment for coal then sold and delivered. Upon the trial before a referee the complaint was proved in substance, and he reported in favor of the plaintiff. The judgment thereupon entered was affirmed on appeal at General Term in the First District, and the defendant Cross appealed to this court.

Johnson, C. J. This action is upon a promissory note made by one McGervey, payable to the order of James Moore, and indorsed in blank by John A. Cross, James Moore, and John McNamee. The plaintiff is the James Moore to whose order the note is payable. It was proved that, upon a negotiation for a sale of coal by Moore to McGervey, Moore agreed to sell him the coal for his note, indorsed by Cross, and that for this purpose Cross indorsed the note. The sale accordingly took place, and the coal and note indorsed by Cross were respectively delivered. The note was discounted for Moore at the Atlantic Bank, and being unpaid at maturity was duly demanded and notice duly given to Cross. It was subsequently taken up at the bank by Moore, the plaintiff. The question is whether, on this state of facts, Moore can recover in this action against Cross.

It is quite conceivable that, in the ordinary course of business, a promissory note may, before it falls due, come to the hands of a person who already appears upon it as payee or indorser. In such a case he cannot maintain an action against any of the parties whose

indorsements are subsequent to the first appearance of his name. The legal reason is that each of those persons on paying to him the note, would have an immediate right to demand payment from him on his earlier indorsement. The law, to avoid this circuity, denies an action to a party thus situated. If the note had passed through his hands without indorsement, or if it had been indorsed without recourse by him, the reason would not exist, and there could be no objection, founded on his prior holding or indorsement, to the maintenance of an action by him against the parties liable on the note.

Again, if a note be made and indorsed for the accommodation of A, who indorses it to another person and afterward, in the course of trade, again becomes the holder, he could maintain no action against the maker and indorser for his accommodation; notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the action, and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing. This, in principle, is very like what the plaintiff seeks to maintain in this case. Having brought his action as holder, and producing the paper indorsed in blank, he has prima facie made out a title as such, and to rebut the inference which arises on the face of the paper, that a recovery by him against Cross would only lead to a new recovery by Cross against him, he shows that the defense of circuity is not available against him, inasmuch as Cross could have, by the original agreement of the parties, no recovery against him. The case is, as to its legal merits, the same as if Cross had taken up the paper from the bank and brought an action against Moore as payee, and in such a case no one could doubt the competency of the proof of the facts now in proof, or their conclusiveness to defeat Cross's action. (*Labron* v. *Woram*, 1 Hill, 91.) Between parties thus standing in immediate privity with each other, an action could no more have been maintained by Cross against Moore than it could had Moore been strictly an accommodation indorser for Cross.

When this note was originally in Moore's hands the blank indorsement of Cross could have been rendered entirely conformable to the real agreement and object of the parties by Moore's making his own indorsement without recourse in terms. Upon such an indorsement the paper would no longer have afforded a prima facie answer to Moore's action against Cross; nor could Cross have maintained that

such an indorsement was unwarranted, as it would have exactly carried out the intention of the parties. Between these parties I can see no reason why the indorsement might not thus have been made at the trial; or why it may not now, being a mere matter of form and the right to make it being proved, be treated as made:

Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guaranty and charging the indorser as a maker or guarantor. This doctrine was advanced in *Herrick* v. *Carman* (12 John. 160), and was adjudged in *Nelson* v. *Dubois* (13 John., 175), and *Campbell* v. *Butler* (14 John. 349). It was attacked in *Dean* v. *Hall* (17 Wend. 214) and in *Seabury* v. *Hungerford* (2 Hill, 80), and was finally overthrown in *Hall* v. *Newcomb* (3 Hill, 233), and the same case in error (7 Hill, 416). The Chancellor, in his opinion in the latter case, says:

> If the object of the second indorser was to enable the drawer to obtain money from the payee of the note, upon the credit of the accommodation indorser, he may indorse it without recourse: and, by such indorsement, may either make it payable to the second indorser or to the bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser.

He proceeds to say that the party might proceed on the common counts, giving a copy of the note and indorsements; but that he must, in either case, show demand and notice to charge the indorser. In *Spies* v. *Gilmore* (1 Comst. 321), the doctrine came before this court under slightly different circumstances. Want of demand and notice were held to be excused upon the circumstances of the case, in the superior court. In this court it was discussed and decided on the question of the sufficiency of the excuse; and not an intimation is to be found throwing any doubt upon the position that had those defects not existed, the plaintiff might have recovered. The later cases of *Brown* v. *Curtis* (2 Comst. 225), *Hall* v. *Farmer* (*idem*, 553), and *Dunham* v. *Manrow* (*idem*, 533), being upon written guaranties, and not upon indorsements, are not applicable to this case.

The cases of *Herrick* v. *Carman* (10 John. 224 and 12 John. 159), and *Tillman* v. *Wheeler* (17 John. 326), are entirely in harmony with this view. In neither of them was it made to appear that the second indorser put his name on the paper to give the maker credit with the

payee. On that ground each of them was decided, while the whole scope of the opinions show that with that proof the court would have sustained a recovery. The case of *Waterbury* v. *Sinclair* (16 How. Pr., 329) sustains the general position of the plaintiff, as do the opinions of JUSTICE S. B. STRONG and JUSTICE EMOTT, though the decision of the former was overruled upon the ground that there should have been an actual indorsement without recourse. It seems to me that, under the present system, if a right so to indorse appears, and it may be done even at the trial, that substantial justice is promoted by regarding it as done and looking upon its actual doing as the merest matter of form.

The recovery was founded on correct legal principles. The fact that an indorsement without recourse would present exactly such a case might frequently happen in the transaction of business, and if so happening would strike no one as violating the ordinary theory of promissory notes, shows that the real rights of these parties are capable of being enforced without violence of any rule of law, under the contract they have actually made.

Judgment affirmed.

QUESTIONS

1. What instruments must be indorsed? How is an indorsement accomplished? Who is the proper person to indorse a given instrument?
2. In the principal case it appeared that X had signed his name on the back of the note before the payee had signed it. Many diverse views have been advanced as to the liability of X. Some of these are: (*a*) that X is not liable on the note at all; (*b*) that he is liable as a co-maker of the instrument; (*c*) that he is liable as a guarantor; (*d*) that he is liable as second indorser; (*e*) that evidence may be admitted to show what liability he intended to assume. Which seems to you to be the soundest of these views?
3. What view did the principal case take as to the liability of X? How did the court work this liability out?
4. What provisions are found in the N.I.L. providing for the liability of an irregular indorser?
5. A had D draw a bill on him payable to D or order. X signed the bill on the back at A's request to induce D to take the bill. A failed to pay the bill when it fell due. D brought an action on it against X. What decision under the N.I.L.?
6. M gives a note to P who indorses it to Q. Q in turn indorses it to H. X signs the note after Q and before it is delivered to H. What are the rights of H against X under the N.I.L.?

STONE *v.* RAWLINSON

Willes' Reports 559 (1745)

Action on promissory note for fifty guineas, made by defendant payable to the order of Watson, who died before he had indorsed. His administrator indorsed the note and delivered it to plaintiff, who sued defendant as maker.

Willes, L. C. J. The third point, therefore, and the only one which remains to be considered is, whether the executor or administrator of a person to whom or to whose order a promissory note is made payable can assign over such a note so as to enable the indorsee to bring an action upon it in his own name. It is admitted upon both sides that there never has been any judicial determination upon this point.

As this is a matter which greatly concerns the trade and commerce of the nation, and as it has never been judicially determined before, we thought ourselves at liberty, and that it was the most proper method we could use to inquire of traders and merchants of undoubted credit what has been the practice in this case ever since the act of the third and fourth of Queen Anne, and how the act has been understood by them. We have done so, and they all agree that it has been the constant practice for executors and administrators to indorse such notes and inland bills of exchange, and that promissory notes, when so assigned, have always been considered as such within the statute, and they may be put in suit by the indorsees in the same manner as if they had been indorsed by the testator or intestate. As, therefore, we are fully satisfied that this has been the constant practice, and that the law has always been so understood among traders, and as the courts of law have always in mercantile affairs endeavored to adapt the rules of law to the course and method of trade in order to promote trade and commerce, instead of doing it any hurt, so we are determined in the present case to make this indorsement valid according to the practice, if we can by any means make it consistent with the act and agreeable to the rules of law. And we think it is easy to do both.

I think I may make a syllogism which will be conclusive in the present case. Whoever has the absolute property in a bill made payable to one or his order may assign it as he pleases within the provisions of the statutes (which was to the effect that promissory notes should be negotiable as inland bills were negotiable), and

such assignee may maintain an action in his own name. The executor or administrator of a person to whom such bill is made payable has the absolute property in it, and therefore he may assign it to whomever he pleases and his assignee may maintain an action in his own name.

Judgment for the plaintiff.

QUESTIONS

1. Who had legal title to the note in question before the death of Watson? What became of the legal title on his death? How can legal title to an instrument be transferred after the death of the owner?
2. Is this case in conflict with *Bromage* v. *Lloyd*, *supra*, page 356?
3. P, payee of a note, makes an assignment for the benefit of creditors. The assignee indorses the note in question to H. H brings an action on the note. What decision?
4. M makes a note payable to the order of A, B, C, and D. D indorses and delivers it to H. H sues M on the note. What decision?
5. Would your answer to the foregoing question be the same, in case A, B, C, and D were partners?
6. M makes a note payable to the order of P. P dies, appointing Q and R as his executors. Q indorses the instrument to H. H sues the estate of M on the note. What decision?

II. TITLE AND POSITION OF THE TRANSFEREE

BURCH *v.* DANIEL

101 Georgia Reports 228 (1897)

Lumpkin, P. J. In order to authorize one to institute and maintain in his own name an action upon a promissory note, the legal title to the paper must be in the plaintiff.

This was an action by Daniel upon promissory notes which were originally payable to John A. Fretwell, or order. Upon each of the notes was written the following transfer: "For value received, I hereby sell and transfer the within note to C. S. Pope, without recourse on me. J. A. Fretwell." Without the knowledge or consent of the makers of the notes, the word "order" had been in each of them erased, and the word "bearer" substituted in its stead, before the action was brought, though it does not appear when or by whom these alterations had been made, or that this had occurred before Daniel, the plaintiff, became possessed of the notes. Whatever may be the truth as to this matter, it is certain that the legal title to the notes

was not in the plaintiff when he brought his action. Manifestly it was in Pope, as the notes had never been indorsed by him to anyone. The unauthorized change in the phraseology of the notes, whether innocently or fraudulently made, did not render them negotiable by mere delivery. If Daniel was in fact the equitable owner of the notes, he might have instituted an action thereon for his use in the name of the person holding the legal title, but, under the facts as they appear in the record before us, his case falls squarely within the rule announced at the beginning of this opinion. In this connection see *Dalton City Co.* v. *Johnson*, 57 Georgia, 398; *Benson* v. *Abbott, Parker & Co.*, 95 Ga. 69.

Judgment reversed.

QUESTIONS

1. The court said in this case: "In order to authorize one to institute and maintain in his own name an action upon a promissory note, the legal title to the paper must be in the plaintiff." What is this thing which the court calls legal title?
2. P is the owner of an instrument payable to his order. In what way can he transfer it so as to confer a legal title on H?
3. P is the owner of an instrument payable to bearer. In what way can he transfer it so as to confer a legal title on H?
4. The court spoke in this case of equitable ownership of a negotiable instrument. What is equitable ownership? How is it acquired?

KINYON *v.* WOHLFORD

17 Minnesota Reports 239 (1871)

Action on a promissory note, brought in the district court for Steele County, resulting in a verdict for the defendant. Plaintiff moved for a new trial, which was denied, and he appeals to this court from the order denying such new trial. A single point only is discussed in the appeal, which is fully stated in the opinion.

Berry, J. This is an action upon a promissory note payable by its terms to C. W. Stevens, or bearer, and signed by the defendant.

There was plenary evidence showing that the plaintiff is a bona fide holder of the note, having purchased the same before maturity in good faith, without notice and for value.

The only defence urged here is that there is no *delivery* of the note to any person by or on behalf of the defendant; that for want of *delivery* it is not the note of the defendant, and he is not liable thereon even to a bona fide holder.

"A *bona fide* holder for value, without notice is entitled to recover upon any negotiable instrument which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft, or by robbery." Story on *Promissory Notes*, section 191; 2 Gr. Ev., section 171; *Swift* v. *Tyson*, 16 Pet. 1; *Goodman* v. *Symonds*, 20 Howard, 365; *Raphael* v. *Bank of England*, 17 C.B. 162; *Wheeler* v. *Guild*, 20 Pick. 545; *Magee* v. *Badger*, 34 N.Y. 249; *Powers* v. *Ball*, 27 Vt. 662; *Catlin* v. *Hamon*, 1 Duer, 325; *Gould* v. *Seger*, 5 Duer, 268; *Marston* v. *Allen*, 8 Mees. & Welsby, 494.

The fact that there has been no delivery of the instrument by or for the maker, or by or for an indorser through whom the holder must claim, is a defect or infirmity of title within the meaning of the rule cited above, a rule which is said to be laid up among the fundamentals of the law. *Worcester County Bank* v. *Dorchester and Melton Bank*, 10 Cushing, 488; Edwards on *Bills and Notes*, 188; *Gould* v. *Seger*, *supra; Ingham* v. *Primrose*, 7 C.B. (N.S.) 82; *Shippey* v. *Carrol*, 45 Ill. 285; *Clark* v. *Johnson*, 52 Ill.

The order denying a new trial must be reversed.

QUESTIONS

1. M executes a note to the order of P but does not deliver it. P gets possession of the instrument without M's knowledge. (*a*) P sues M on the note. (*b*) H, an indorsee of P, sues M on it. What decision in each case?
2. M executes a note payable to bearer. T steals it from him. (*a*) T sues M on the note. (*b*) H, who purchases the instrument from T, sues M on it. What decision in each case?
3. M executes a note to P or order, promising him $500 as a gift. (*a*) P sues M on the note. (*b*) H sues M on it. What decision in each case?
4. D draws a bill on A to the order of himself. A is induced to accept the bill by a fraudulent misrepresentation of D as to his solvency. (*a*) D sues A on the bill. (*b*) H sues A on the bill. What decision in each case?
5. M, at the point of a gun, is forced to sign a promissory note in favor of P. (*a*) P sues M on the note. (*b*) H sues M on it. What decision in each case?
6. M, while in a state of intoxication, executes a note to P. (*a*) P sues M on the note. (*b*) H sues M on it. What decision in each case?
7. M executes a note to the order of P. He leaves the amount blank and directs P not to fill it in for more than $250. P fills it in for $500.

(*a*) P sues M on the note. (*b*) H sues M on it. What decision in each case?

8. M executes a note to the order of P, payable July 1, 1922. On June 15, M pays the amount of the note to P, but leaves the instrument in the latter's possession. (*a*) P sues M on the note. (*b*) H sues M on the note. What decision?
9. In the foregoing case, the note is payable on or before July 1. On June 15, M pays the amount of the note to P, but leaves the instrument in P's possession. What decision in an action by H on the note?
10. P was the owner of an accepted bill of exchange drawn to his order. He indorsed it in blank and left it in his desk. T stole the instrument and sold it to Q who had no notice of the theft. Q sold it to H. H sues A on the bill. A proves by way of defense that H knew of the theft when he bought the instrument. What decision?

COLSON *v.* ARNOT

57 New York Reports 253 (1874)

Appeal from order of the General Term of the Supreme Court in the third judicial department, setting aside a verdict for the defendant at the circuit, and granting a new trial.

This action was brought by the plaintiff, after demand and refusal, to recover the possession of two county bonds of $300 each.

The bonds were issued September 1st, 1864, and due March 1st, 1866, payable to the order of one Jonathon S. Roll, a volunteer in the military service of the United States. Roll transferred them before maturity by an indorsement in blank, and for a valuable consideration, to the plaintiff. The following is a copy of one of the bonds which were alike, except as to numbers:

"State of New York

$300 N. 305

"On the 1st day of March, 1866, the county of Seneca promises to pay to the order of Jonathon S. Roll, three hundred dollars, with annual interest, at the office of the Treasurer of said county. Dated Sept. 1st, 1864.

"Josiah Rogers, Chairman

"Silas Kinne, Clerk"

There was an indorsement on the bond that interest had been paid to March 1, 1865.

The bonds were lost or stolen from the plaintiff's pocket on the thirteenth day of May, 1865. On the twenty-fifth day of October,

1865, and before the maturity of the bonds, they were offered for sale to the defendant at the Chemung Canal Bank, in Elmira, of which institution he was an officer. They were purchased by him in the course of trade, though he did not follow the specific business of buying and selling county bonds. When the bonds were purchased, the indorsement of the payee's name had been erased, though it was there at the time of the loss or theft. There was no evidence that the defendant had any knowledge of the erasure. The defendant having no acquaintance with the person professing to be the payee, who offered them to him for sale, declined to purchase without identification. This was supplied by a person named Churchill, known to the defendant, who was a person also known not to be of the highest character but not known to be of positively bad character. The personator of the payee, on writing the first name of the payee on the bonds, spelled it in one case "Johonithan," and in the other, "Johenithan."

The bonds were purchased for $580. The evidence showed that the amount paid was equal to their market value in Elmira at the time of the sale.

The court directed the jury to find a verdict for the defendant, and to assess the damages for the detention of the bonds at a nominal amount, and their value at $600, to which direction the plaintiff excepted. The exceptions in the cause were ordered to be heard in the first instance at the General Term.

Earl, C. It is undisputed that these bonds, with the indorsement thereon of the name of the payee, were negotiable by delivery, like promissory notes and bills of exchange. A thief or a finder could give title to them to a bona fide purchaser for value; and the same rules are applicable to them which apply to other negotiable paper. (*Bank of Rome* v. *Village of Rome*, 19 N.Y. 20; *Birdsall* v. *Russell*, 29 N.Y., 220; *Brainerd* v. *New York and Harlem Railroad Company*, 25 *idem*, 496.)

The indorsement of these bonds by the payee did not unalterably fix their character, so as to make them negotiable by mere delivery. Any lawful holder could fill up the blank indorsements by making them payable to his own order or the order of another person, and then they could not pass by mere delivery. And any person owning them could have erased the indorsement of Roll. This would not have destroyed the bonds but would have destroyed the indorsements, and then they could have been negotiated again only after the genuine indorsement of Roll was again procured. Any lawful owner of such

paper can, without avoiding the paper itself, erase and thus cancel any or all the indorsements thereon, without affecting his title to the paper or his right to resort to any of the names thereon prior to those erased. (*Dollfus* v. *Frosch*, 1 Denio, 367; Chitty on *Bills*, 230; Story on *Promissory Notes*, section 142; 2 Parsons on *Notes and Bills*, 29.) Any intentional, material alteration of such paper by the owner thereof will destroy it so that he cannot maintain an action thereon against any of the parties thereto. But an accidental destruction or mutilation thereof, or an unintentional alteration thereof, by the owner will not have such effect; and neither will the destruction, mutilation, or alteration thereof by a stranger have such effect. In such cases secondary evidence can be resorted to, to establish the paper, and a recovery had upon it as it was originally made. (1 Greenleaf's *Evidence*, 566; 2 Parsons on *Notes and Bills*, 574.)

The general rule applicable to personal property is, that the seller, although in possession of the property, can give no better title than he has. From the operation of this rule negotiable paper is excepted. The exigencies of business and commerce are such as to require the free circulation of such paper. It takes the place and performs, to a large extent, the office of money. It is used for the transaction of much the largest part of the business of mankind. It would be most embarrassing, therefore, if every taker of such paper was bound at his peril to inquire into the title of the holder and if he was obliged to take it with all the imperfections and subject to all the defenses which attach to it in the hands of the holder. It has therefore, for more than 200 years, been the settled law of England and this country that a thief, or any other person having possession of such paper, fair upon its face, can give a bona fide purchaser for value a good title to it, against all the parties thereto, as well as the true owner. To have this quality it must be fair and regular upon its face; it must be payable to bearer, or to order and indorsed by the payee. A forged indorsement, no matter how cautious the purchaser may be, will give no title. (*Graves* v. *American Exchange Bank*, 17 N.Y. 205.)

Upon what theory is it that a holder, without title, can transfer title to such paper? It is said it is because the law arbitrarily gives him the capacity to transfer title to such paper to a bona fide holder for value. I apprehend that a better statement of the theory is that he has capacity to give the title, because he is the apparent owner of the paper. Every holder of such paper is presumed to be

the owner. Unless he be the apparent owner, he cannot give title even to a bona fide purchaser for value, and unless the purchaser relies upon the apparent ownership, he cannot be a bona fide purchaser. JUSTICE CLIFFORD, in *Goodman* v. *Simonds* (20 How. U.S. 365), speaking of such paper, says: "The title and possession are considered as one and inseparable, and, in the absence of any explanations, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear." In *Central Bank of Brooklyn* v. *Hammett* (50 N.Y. 158), it is said by the court that "one who obtains the transfer of negotiable paper before maturity and for full value, without notice of any defect in the title of the apparent owner, acquires all the rights of a *bona fide* holder by title derived from the actual owner. The possession of a bill or note, payable to bearer or indorsed in blank, by one not a party to the instrument, is presumptive evidence of ownership." In *Belmont Branch Bank* v. *Hoge* (35 N.Y. 65), JUDGE PORTER says: "One who, for value, obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defect in the title of the presumptive owner, is to be deemed a *bona fide* holder."

The thief, in this case, was not the apparent owner of the bonds. He came to the defendant with two bonds, payable to the order of Roll, without his indorsement upon them. It matters not that he personated Roll, and the defendant believed him to be Roll. The defendant is in no better position as to title than he would have been if he had known who the thief was. He did not take paper, fair and regular upon its face, from a person having possession of such paper and apparently the owner thereof. The false personation and forgery give him no title. He did not rely upon anything that appeared upon the bonds, and was not deceived or misled by them. But, he relied upon the representations of the thief, and was deceived by them. Against such deception the laws, applicable to negotiable paper, were not intended to guard. It is their purpose to facilitate the circulation of paper, fair and regular upon its face, and to protect the bona fide purchasers of such paper. The exigencies of business and commerce do not require that paper, payable to order, should circulate freely without indorsement. The reason which lies at the foundation of the laws, in reference to the transfer of negotiable paper, does not apply to such a case, and the maxim, *cessante ratione legis cessat ipsa lex* should be applied.

In further illustration, suppose the thief of negotiable paper entirely destroys it, can he make a facsimile and give anyone a cause of action upon the original instrument? This will not be claimed, and yet the owner has lost one of his rights. He must treat the paper as if it had not been destroyed. He must make demand and protest for non-payment and bring suit upon the original instrument and give secondary evidence of its contents. The thief cannot, by false personation or forgery, give title to the cause of action upon the original instrument because he is not the possessor or apparent owner thereof. Suppose a thief should erase the name of the maker or drawer of a note or bill of exchange and then forge the same signature, could he give a bona fide purchaser for value title to the paper? I am clearly of opinion that he could not. The paper is not fair upon its face. There is a forgery, and although the purchaser may be ignorant of it, the law merchant does not protect him against such ignorance. He must know at his peril that the signatures are genuine. We are asked, suppose the name of the payee, indorsed upon mercantile paper, faded out so as to be invisible, does it affect the negotiable character of the paper? Most certainly it does. The title and rights of the owner remain the same as before; but a thief could give no title to such a paper to anyone, because he cannot be the apparent owner thereof, and there is nothing on the face of the paper to induce belief that he is the owner.

But there is another course of reasoning, equally conclusive, it seems to me, which defeats the defendant's claim. The thief was not in every sense a stranger to the bonds; he was such as to the plaintiff, and whenever she has reclaimed them she will hold them unaffected by anything which the thief has done to them. But was he a stranger as to the defendant? Assuming that he may be treated as a bona fide purchaser, all the title he claims he got from the thief. As to him, the law treats the thief as the owner; he dealt with him upon the assumption and presumption of his ownership. It is not for him to say that the thief was not the owner, and while he claims that he was competent to give him title, he cannot deny that he was competent to destroy the paper by its mutilation or alteration. As to him, the thief had the same power, while he held the paper, to erase the indorsement and thus make it non-negotiable by mere delivery, as the true owner would have had. One who buys such paper from a thief must take it in the condition it is when it leaves the hands of the thief, and he can take it in no other way. I can

perceive no reason for awarding a purchaser from a thief a better position than he would occupy if he had been a purchaser from the same person being the true owner. Suppose the thief had altered these bonds by raising them to $3,000, and had not erased the indorsement, how would that have affected the bonds? As to the plaintiff, it would have been a mere act of spoliation and would have had no effect. But as to a purchaser from the thief, it would have destroyed them. He could neither enforce them for $3,000 nor $300. It cannot be the policy of the law to facilitate the free circulation of forged, altered, or mutilated paper. The purchaser of such paper must take the risk of its genuineness. The law protects him only in the purchase of genuine commercial paper, in good faith.

It follows that the order of the General Term must be affirmed and judgment absolute ordered against the defendant, with costs.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. If the thief had not erased Roll's signature from the instrument, would the defendant have secured an unimpeachable title by his purchase? If so, why does the mere erasure of the signature so change the situation that the defendant is not protected? Is he not just as meritorious in the one case as in the other?
3. Before erasing the signature of Roll, could the thief have recovered judgment on the bonds? If not, how could he have passed a title to a bona fide purchaser?
4. What is the theory of the law which permits a thief to pass a better title to a bearer instrument than he himself has? Is it because theft of such property creates a title in the thief? Is it that, because of his possession, the law arbitrarily gives him the power to create in a bona fide purchaser a valid title?
5. Is there any justification for the policy of the law which permits a person to create in another a good title to an instrument when he himself has none?
6. Can a person pass a good title to a horse which belongs to another? Can a thief pass a good title to money which he has stolen?
7. T finds a promissory note, payable to bearer, executed by M. He makes a perfect copy of the note and sells the copy to H. What are H's rights, if any, on the copy against M?
8. T finds a note, payable to the order of P, executed by M. He forges an indorsement on the instrument and sells it to H. What are the rights of H on the instrument?

LANCASTER v. BALTZELL

7 Gill and Johnson's Maryland Reports 468 (1836)

Action by the second indorsee against the maker of a promissory note. Defense, forgery of the first indorsement. On instructions, there was a verdict and judgment for the plaintiffs.

Buchanan, C. J. A bill or note payable to order can only be transferred by indorsement, and, as an action against the acceptor or drawer can only be sustained by one who has legal title, which cannot be derived through the medium of forgery—it is incumbent on the plaintiff in such an action, to show his interest in the bill or note, which must be done by proving that it was indorsed by the person to whom, or to whose order, it is made payable.

This is an action by the second indorsee against the maker of a promissory note, payable to the payee or order, which was resisted at the trial on the ground that the first indorsement, purporting to be by the payee was a forgery, of which proof was offered by the defendant. On the part of the plaintiffs, it was proved that the defendant on being called on by their counsel, after the indorsement to them to pay the note, examined it, and said it was right, and he would settle it with them. Upon which the court instructed the jury that if they believed that the defendant, when the note was presented to him by the counsel of the plaintiffs, had examined the indorsements and said it was right, the plaintiffs were entitled to recover, although they might believe the indorsement of the payee's name had been forged, and notwithstanding that acknowledgment had been made, after the transfer of the note by these indorsements to them, on an exception to which instruction the case is brought up.

Apart from the alleged conversation between the defendant and the counsel of the plaintiffs, it is very clear that the plaintiffs are not entitled to recover if the first indorsement in the name of the payee of the note was forged, as the title was not and could not thereby be transferred but continued in the payee, who, on obtaining possession of the note, might sue upon it and recover against the maker, notwithstanding he should have paid it to him, into whose hands it came, through the medium of the forgery; for besides that in such case the payee has not parted with his title, the payee of a note, whose name is forged, knows nothing of it, and the maker, before he pays it to the holder as indorsee, should look carefully to the indorsements. And if one is to suffer, the loss should fall on him who is most in fault or most negligent.

The only question then, in this case, is whether, if after the indorsements had been made, the defendant, on the note being presented to him by the counsel of the plaintiffs, examined the indorsements and said it was right, that makes any difference. And we think it does not. By saying so he gave no credit to the note and did not thereby induce the plaintiffs to take it. That had been done before and not on the faith of what he said. The plaintiffs might, before they took the note, have inquired whether the first indorsement was by the payee or not, and not having done so they must abide by the consequences and cannot throw the loss upon the defendant, who had done nothing to mislead them or induce them to take the note, and who, if made to pay the amount in this action, may be made to pay it over again by the payee, whose right remains unimpaired.

It is not like the case of a drawee of a bill, who, if on being asked if the acceptance is in his handwriting, he says that it is and that it will be duly paid, cannot afterward set up as a defense the forgery of his name, because by saying so he has accredited the bill and induced another to take it, which being his own fault the loss ought to fall on him, and not on another who has been induced to take the bill on the faith of his assurance.

Judgment reversed.

QUESTIONS

1. What instructions were given by the lower court to the jury? What was the error in these instructions? What instructions should have been given?
2. T forges M's signature to a note, payable to himself or order, and indorses it to Q. H, about to buy the note from Q, asks M if his signature is genuine. M states that it is. H buys the note. M discovers the forgery and refuses to pay the note. What decision in an action by H against M on the note?
3. M executes a note payable to the order of P. T steals the note and indorses it to H. H sues M on the instrument. M defends on the ground that the first indorsement is forged. H replies that the forged indorsement is P's business not M's. What decision?
4. T forges D's name to a bill drawn on A to the order of T. T indorses it to H. H presents the bill to A and A accepts it. At maturity, H sues A on the bill. A pleads the forgery of D's signature as a defense. What decision?

5. In the foregoing case, suppose that A had paid the bill at maturity, in ignorance of the forgery, without having previously accepted it, could he have recovered the money so paid from H?
6. D draws a bill on A payable to T or order and delivers it to T. T forges A's signature to an acceptance and sells the bill to Q. Q asks A if his signature is genuine and A states that it is. H hears the statement of A and buys the bill from Q in reliance on it. H sues A on the bill. A sets up forgery as a defense. What decision?
7. M, totally insane, executes a promissory note to P or order. P sells the note to H. H sues M on the instrument. A plea of insanity is entered for M. What decision?
8. M, an infant, accepts a bill of exchange drawn to the order of P. P sells the bill to H. H sues M on the instrument. A plea of infancy is entered for M. What decision?
9. M, a member of a non-trading partnership, signs a promissory note to the order of P, without authority of his co-partners. P sells the note to H. H sues the partnership on it. What decision?

WALKER *v.* EBERT

29 Wisconsin Reports 194 (1871)

Action on a promissory note, by a holder, who claims to have purchased it for full value, before maturity. The answer alleges that the defendant is a German by birth and education, and unable to read and write the English language; that on the date of the supposed note, the payees thereof, by their duly authorized agent, falsely and fraudulently represented to him, with intent to swindle, cheat, and defraud him, that they would appoint him sole agent for his town of a certain patented machine, for ten years, and would deliver to him one of said machines free of cost, except freight, and that he should receive 50 per cent of all profits on his sales; and that he accepted such agency upon those terms; and that the payees, by their said agent, then presented to him, to sign in duplicate, an instrument, partly written and partly printed, which he was unable to read, and which such agent falsely and fraudulently represented to be simply a contract embracing the terms orally agreed upon between them, and he, believing it to be so, signed his name to it in duplicate; that such payees never delivered the machine promised, and never intended to do so, and defendant never sold any.

On the trial, the defendant offered to prove by his own testimony the facts so alleged by him relative to his signature to the note in

suit, and that he never delivered it to anyone, which evidence was objected to by the plaintiff, and ruled out by the court, and there being no further evidence, the court directed the verdict for the plaintiff. A motion for a new trial was overruled and judgment entered on such verdict, from which the defendant appeals.

Dixon, C. J. The defendant, having properly alleged the same facts in his answer, offered evidence and proposed to prove by himself as a witness on the stand, that at the time he signed the supposed note in suit, he was unable to read or write the English language; that when he signed the same, it was represented to him as, and he believed it was, a certain contract of an entirely different character, which contract he also offered to produce in evidence; that the contract offered to be produced was a contract appointing him, the defendant, agent to sell a certain patent right and no other or different contract, and not the note in question; and that the supposed note was never delivered by the defendant to anyone. It was at the same time stated that the defendant did not claim to prove that the plaintiff did not purchase the supposed note before maturity and for value. To this evidence the plaintiff objected, and the objection was sustained by the court, and the evidence excluded, to which the defendant excepted, and this presents the only question.

We think it was error to reject the testimony. The two cases cited by counsel for the defendant (*Foster* v. *McKinnon*, L.R. 4 C.P. 704, and *Whitney* v. *Snyder*, 2 Lansing, 477), are very clear and explicit upon the point and demonstrate, as it seems to us, beyond any rational doubt, the invalidity of such paper, even in the hands of a holder for value, before maturity, without notice. The party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

The reason of the foregoing cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself, and the proposition is to show that it is not in law or in fact what it purports to be, namely the promissory note of the supposed maker. For the purpose

of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a bona fide holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation or transfer or bona fide holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument cannot be held to be such and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence or whether it is really and truly what it purports to be, is *petitio principii*, begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning and investigation by assuming the truth of the conclusion and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purposes of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. It must always be competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts, as, by infants, married women, or insane persons; or where they are void for other cause, as for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instruments by putting them in the form of negotiable paper. See *Veeder* v. *Town of Lima*, 19 Wis. 297–99, and authorities there cited. See also *Thomas* v. *Watkins*, 16 Wis. 549.

In the case first cited above the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor, that he was signing a guaranty. In an action against him as indorser at the suit of a bona fide holder for value, the Lord Chief Justice, BOVILLE, directed the jury that, "If the defendant's signature to the document was obtained upon a

fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict"; and this direction was held proper. In delivering the judgment of the court upon a rule *nisi* for a new trial, BYLES, J., said, "the case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that when he signed one thing, he was told and believed he was signing another and an entirely different thing; and that his mind never went with his act."

It seems plain on principle and on authority, that if a blind man, or a man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterward signs, then, at least, if there be no negligence, the signature so obtained is of no force, and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature, in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended.

And again, after remarking the distinction between the case under consideration and those where a party has written his name upon a blank piece of paper, intending that it should afterward be filled up, and it is improperly filled, or for a larger sum, or where he has written his name on the back or across the face of a blank bill stamp, as indorser or acceptor, and that has been fraudulently or improperly filled, or in short, where, under any circumstances, the party has voluntarily affixed his signature to commercial paper, knowing what he was doing, and intending the same to be put in circulation as a negotiable security, and after also showing that in all such cases the party so signing will be liable for the full amount of the note or bill, when it has once passed into the hands of an innocent indorsee or holder, for value before maturity, and that such is the limit of the protection afforded to such an indorsee or holder, the learned judge proceeded:

But, in the case now under consideration, the defendant, according to the evidence if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no neg-

ligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or an order for admission to Temple Church, or on the fly-leaf of a book, and there had already been without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of the genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons—first, that he never in fact signed the writing declared on, and secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

The judgment below must be reversed and a *venire de novo* awarded.

QUESTIONS

1. What would have been the decision of the court in the principal case if it had been established by the evidence that the defendant had been negligent in signing the paper in question?
2. P falsely and fraudulently represents to M that he is the owner of a certain horse and offers to sell it to M for $300. M accepts the offer and executes his promissory note to the order of P for the purchase price. (*a*) P sues M on the note. (*b*) H, an indorsee of P, sues M on the note. In each case M pleads fraud as a defense. What decision in each case?
3. In the foregoing case, M was induced by fraud to execute the note; in the principal case, the maker was induced by fraud to sign the note. What is the difference between the fraud in the one case and the fraud in the other?
4. P presents a note to M and asks him to sign it. P thinks that M knows that the paper is a note. M, thinking that it is something else, signs without reading it. (*a*) P sues M on the note. (*b*) H sues M on it. What decision in each case?
5. Would your answers be the same in the foregoing question if P had falsely and fraudulently represented to M that the paper was not a note?
6. A is authorized by M to buy goods on his account. A buys goods from P and gives a note in M's name for them. (*a*) P sues M on the note.

(*b*) H sues M on the note. In each case M pleads lack of authority on the part of A to sign promissory notes for him. What decision in each action?

7. H sues M on a note payable to P or order which, though not apparent on the face of the note, includes usurious interest. M defends on the ground that a statute in the state in which the note was executed declares such contracts to be void. What decision?

NATIONAL EXCHANGE BANK OF ALBANY *v.* LESTER

194 New York Reports 461 (1909)

Appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 16, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The defendant was sued as the accommodation indorser upon a note for $375 made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of business.

The defense was that the note as originally made and indorsed was for $75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "three hundred" immediately in front of the words "seventy-five" and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for $375 instead of $75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff's bank. The answer prayed judgment that the complaint be dismissed except as to the amount of the note before alteration together with interest and protest fees, to wit, $78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount.

Upon the trial the court charged the jury that if the note indorsed by the defendant was in fact a note for $375 on its face, the plaintiff was entitled to recover that amount and interest.

The trial judge further charged the jury that if they found that there were spaces upon the note "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure 3 and the words 'three hundred' so as not to occasion in the mind of the indorsee any inquiry into its validity," they might find that the indorser conducted himself carelessly and negligently in the premises and thus invited the liability which the face of the note called for when presented to the bank.

The defendant duly excepted to that part of the charge to the effect that if the defendant was negligent in leaving blank spaces, the jury must find a verdict for the plaintiff for the full amount of the note as it stood. The court then reiterated the proposition saying that "if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note"; and to this the defendant also excepted.

The jury found for the plaintiff in the sum of $375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division.

Willard Bartlett, J. As this case went to the jury, they might well have found that the note in suit was a note for only seventy-five dollars when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for three hundred and seventy-five dollars when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for seventy-five dollars into a note for three hundred and seventy-five dollars. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncancelled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value"; and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska, and Pennsylvania.

In considering this proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character

as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein, is placed upon the doctrine of negligence or estoppel by negligence.

The cases, cited by respondent in which parties to commercial paper executed by them while obvious blanks remained unfilled thereon have been held liable upon the instrument as completed by filling out such blanks, on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are *Winter & Loeb* v. *Pool* (104 Ala. 580); *Statton* v. *Stone* (61 Pac. Rep. 481, Colorado); *Cason* v. *Grant Co. Deposit Bank* (97 Ky. 487); and *Weidman* v. *Symes* (120 Mich. 657). There were obvious blanks also in the notes under consideration in *Visher* v. *Webster* (8 Cal. 109) and *Lowden* v. *S.C. Nat. Bank* (38 Kan. 533), and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

It must frankly be conceded, however, that the respondent finds support for the doctrine which it asserts in the case at bar in the decisions of Pennsylvania, Illinois, and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. (*Garrard* v. *Haddan*, 67 Pa. St. 82; *Yocum* v. *Smith*, 63 Ill. 321; *Scotland Co. Nat. Bank* v. *O'Connel*, 23 Mo. App. 165; *Hackett* v. *First Nat. Bank of Louisville*, 114 Ky. 193; *Isnard* v. *Torres & Marquez*, 10 La. Ann. 103.)

In *Garrard* v. *Haddan* (*supra*) a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been

inserted after the maker had signed and delivered it and the court held the maker answerable to a bona fide holder for the full face of the note as altered on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution. "We think this rule is necessary," said CHIEF JUSTICE THOMPSON, "to facilitate the circulation of commercial paper and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers, and others in taking it." It is a little difficult to see how the rule tends to make bona fide purchasers more careful, as this last observation suggests.

The case of *Yocum* v. *Smith* (*supra*) held the maker liable upon a note which had been raised after execution from one hundred dollars to one hundred and twenty dollars, the words "and twenty" having been inserted in a space left between the word "hundred" and the word "dollars." The court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he had thus placed it in the power of another to do injury; and that he must, therefore, suffer the resulting loss. This decision undoubtedly sustains the position of the respondent, although there was another element of negligence in that case which is not present here. It appeared that the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount, yet he made no objection as to the amount until nearly a year later.

The question involved in the present appeal has not been authoritatively decided in this state and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well-considered adjudications in other jurisdictions.

The outcome of these adjudications is accurately set forth, as it seems to me, by Mr. Randolph in his treatise on the *Law of Commercial Paper* as follows:

Where negotiable paper has been executed with the amount blank, it is no defense against a *bona fide* holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended. This was also once held to be rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written. It has now, however, become in America an established rule that if the instrument was complete without

blanks, at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention will constitute a material alteration and operate to discharge the maker. [1 Randolph on *Commercial Paper*, sec. 187.]

The rule thus stated is sustained by the decisions of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas, and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine and accords better with such adjudications of the court as bear more or less directly on the question involved.

The leading case sustaining this view is *Greenfield Savings Bank* v. *Stowell* (123 Mass. 196) in which the opinion was written by Chief Justice Gray, afterward an associate justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877), including that of the Supreme Court of Pennsylvania in *Garrard* v. *Haddan* (*supra*) which was the principal authority the other way. I shall not undertake to review the same authorities here or paraphrase the opinion of Chief Justice Gray which deals with them in such a manner as fully to justify his rejection of the doctrine that the makers of a promissory note apparently complete when they sign it are liable for an amount to which it may subsequently be raised, without their knowledge or consent, on the ground that they were negligent in permitting spaces to remain thereon in which the figures and words which effected the increase could be inserted. In support of his conclusion, however, he quotes some passages from the opinion of Christancy, J., in *Holmes* v. *Trumper* (22 Mich. 427), which will bear repetition as suggestive of some of the reasons why the forgery of a promissory note should not be held to create a contract, which the party sought to be charged never consciously made himself or authorized anybody else to make in his behalf. Speaking of the alleged negligence in leaving spaces on the note, Justice Christancy said:

The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument. Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in

whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the characters and credit of those from whom they receive it, and of the intermediate holders.

No one questions the proposition that where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount, such party is liable to a *bona fide* holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. (*Van Duzer* v. *Howe*, 21 N.Y. 531.) So, also, a note executed with a blank therein for a statement of the place of payment is not avoided in the hands of a bona fide holder for value by the insertion in the blank of a place different from that agreed upon by the original parties. (*Redlich* v. *Doll*, 54 N.Y. 234.) But where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. (*McGrath* v. *Clark*, 56 N.Y. 34.) In the case cited the note when indorsed ended with the word "at," followed by a space in which the maker, after indorsement, inserted a place of payment, adding the words, "with interest"; but no suggestion appears to have been made that because the space left was large enough to allow the insertion of these words, the indorser was negligent and could be charged with the amount of the note, including the interest, on that ground. On the contrary, as the law then stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the Negotiable Instruments Law (sec. 205) he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement, by means of forgery, is liable upon the instrument in the hands of a bona fide holder, for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery

easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence, for the action is not in tort for damages, but upon the contract as expressed in the note. But apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed and upon what seem to me to be considerations of sound reason independent of judicial authority. An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects—as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument—in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the papers or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true and is evidenced by the cases in the law reports to which we have had occasion to refer, but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. (See *Bradish* v. *Bliss*, 35 Vt. 326.) As was said by JUDGE CULLEN in *Critten* v. *Chemical Nat. Bank* (171 N.Y. 219, 224), it is not the law that the drawer of a

check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the Appellate Division should be reversed and a new trial granted with costs to abide the event.

Judgment reversed.

QUESTIONS

1. M signs his name to a note for $500 but names no payee in it. T steals the note in this form, inserts his own name as payee, and indorses it to H. H sues M on the note. What decision? How does the situation here differ from the one in the principal case?
2. M draws a note in a reasonably careful manner, payable to the order of T, in the sum of $500. T raises the amount of the instrument to $5,000 and indorses it to Q. Q indorses it to H. H sues M on the note as altered. What decision?
3. M refuses to pay the note, in the foregoing case, at maturity. H seasonably notifies Q of the dishonor and sues Q on the instrument as altered. What decision?
4. In question 2, H declares on the note against M according to its original tenor. M contends that the alteration discharges the instrument. What decision at common law? What decision under the N.I.L.?
5. H is the holder of a note made by M, payable thirty days after date. H alters the note by making it payable fifteen days after date. (*a*) H sues M on the note as altered. (*b*) H sues M on the note according to its original tenor. What decision in each case?
6. H, holder of a note executed by M, payable on July 1, without any intention to injure anyone, erases July 1 and inserts August 1. What are his rights against M on the note?
7. D carefully draws a check on his bank and delivers it to T, the payee. T raises the amount and indorses it to H. H presents the check to the bank and receives payment of the check as altered. Who loses the money which T absconds with?
8. D did not examine his canceled vouchers from his bank for a period of six months. When he did make an examination of them, he found that his bank had paid some ten or twelve checks to which his signature had been forged. What are the rights of D, if any, against his bank?
9. What is the effect of the alteration of an instrument by a person not a party to it under the common law? under the N.I.L.?
10. M executes a note to T and negligently leaves spaces in it. T raises the amount of the instrument from fifty to three hundred and fifty

dollars. H sues M on the instrument for three hundred and fifty dollars. What decision?

11. D draws a check on his bank for fifty dollars and negligently leaves spaces in it. T, the payee, raises the amount to three hundred and fifty dollars. The bank in good faith and in the exercise of due care pays the amount of the instrument to H. D sues the bank for three hundred dollars. What decision?

ARMSTRONG *v.* NATIONAL BANK

46 Ohio State Reports 512 (1889)

The original action was a suit by Kate S. D. Armstrong against the Pomeroy National Bank to recover of the bank the sum of $450, due her upon a deposit she had made with the bank. She averred that she had given a check payable to one William Brown or order, that had been procured from her by the fraudulent practices of one Grimes, who represented himself as acting for the said Brown in the negotiation of a note; that there was no such person as Brown, and that the note was fraudulent, of all which she was ignorant at the time; that Grimes afterward indorsed the check "William Brown," and, adding his own indorsement, presented it to the bank which paid it.

The principal ground of defense was that plaintiff was negligent in delivering the check to Grimes, and that it used ordinary care in paying it to Grimes, indorsed as it was.

A motion for a new trial having been made and overruled, judgment was entered for the plaintiff upon the findings.

The judgment of the common pleas was reversed on error by the circuit court, and this proceeding is prosecuted to obtain a reversal of the circuit court and an affirmance of the common pleas.

Minshall, C. J. By the fraud of one Grimes the plaintiff was induced to purchase a note that had no real existence as security. She is found by the court to have been ordinarily careful and prudent in the transaction, but was deceived. She supposed that she was purchasing a valid security belonging to a man, as represented by Grimes, by the name of William Brown, and for whom, as he represented, he was acting as agent, and gave to the assumed agent for Brown a check for the amount, payable to Brown or his order. Now it is evident, both upon reason and authority of the previous decisions, that the circumstances under which the plaintiff was induced to give

the check, even though calculated to arouse suspicion on her part, cannot modify the duty required of the bank in the matter of paying or not paying the check. It is not claimed that the bank had any knowledge of how or under what circumstances Grimes had obtained the check, and there is no finding of any such course of dealing between the bank and the plaintiff as would have authorized it to depart from the general duty of a bank in paying the checks of its customers, drawn payable to a certain person or order. It was its duty to pay to the person named or his order, and to withhold payment, until it was satisfied, both as to the identity of the payee and the genuineness of his signature. Morse on *Banking*, section 474; *Roberts* v. *Tucker*, 16 Q.B. 560, per MAULE, J., at page 578.

It is found that the bank made the usual inquiries respecting the identity of Grimes and in other respects was ordinarily careful and prudent in relation to the transaction, but this must be taken in connection with the further fact that Grimes was not the payee of the check, and that his indorsement, without the genuine indorsement of the payee, could confer no title upon the holder of the check, or any interest in it, as against the drawer. "There is no doubt," says Lord Kenyon in *Tatlock* v. *Harris*, 3 T.R., at page 181, "but that the indorsee of a bill of exchange, payable to order, must in deriving his title prove the handwriting of the first indorser." See *Mead* v. *Young*, 4 T.R. 28, 30; 2 Parsons *Notes and Bills*, 595. The indorsement on the check, purporting to be that of the payee, Brown, had been placed there by Grimes, and was either a forgery or a fraud, and, for the purposes of this case, it is not material which it is termed. As to it, the bank acted upon the representations of Grimes and did not otherwise know whether it was genuine or not. As said in *Dodge* v. *The Bank*, 30 Ohio St. 1: "The rightful possession of a check by no means carries with it or implies a right to demand or receive payment of it, without the genuine indorsement of the person to whose order it is made payable"; and if a banker accept or undertake to pay a check "he must see to it at his peril, that he pays according to the terms of the order, and to the party named therein, or to one holding it under the genuine indorsement of such payee. And this is true, whether the defendant exercised the degree of caution which bankers usually do in such cases, or not. The question is, was the check paid to the party to whom by its terms, it was made payable?" Therefore, the court rightly concluded, as a question of law from the facts found, that the payment of the check by the defendant was not

authorized by the plaintiff, and that it could not rightly be charged to her account.

The fact that the check was made payable to a person that had no existence does not alter the rights of the plaintiff as against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. *Tatlock* v. *Harris*, 3 T.R. 174, 180; *Vere* v. *Lewis*, *idem*, 182; *Minet* v. *Gibson*, *idem*, 481; s.c. in the House of Lords on error, *Gibson* v. *Minet*, 1 H. Bl. 569; *Collis* v. *Emett*, 1 H. Bl. 313; *Gibson* v. *Hunter*, 2 H. Bl. 187. The doctrine that a bill payable to a fictitious person or order, is equivalent to one payable to bearer, had its origin in these cases, which all grew out of bills drawn by Levisay & Co., bankrupts, payable to a fictitious person or order, and were accepted by Gibson & Co.; but it will be noticed that the holding in each case was upon the express ground that the acceptor knew at the time of his acceptance that the bill was payable to a fictitious person; and but for this fact the fictitious indorsement would have been held to be a forgery —some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor. (3 T.R. 181.) These cases will be found reviewed in a note to *Bennett* v. *Farrell*, 1 Campb. 130. It was held in this case that a bill made payable to a fictitious person or order is neither payable to the order of the drawer or bearer, but is completely void. But in an addendum to the case, at page 180*c* of the report, Lord Ellenborough observes that this holding must be taken with this qualification: "unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The rule with this qualification is stated as the law in Byles on *Bills*, 73. See also to the same effect *Forbes* v. *Espy*, 21 Ohio St. 483; 1 Rand., *Commercial Paper*, sections 162, 163, 164; 2 Parsons, *Notes and Bills*, 591 and note (*a*). Mr. Daniels in his work on *Negotiable Instruments*, section 139, states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text. 1 Rand., *Commercial Paper*, section 164, note (4). And upon principle we do not see how the law could be held to be otherwise. For if the fictitious character of the payee is unknown to the drawer, whoever indorses the paper in that name, with intent to

defraud, perpetrates a forgery, and the indorsement is void, a general intent to defraud being sufficient to constitute the offense.

If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other; that is, determine whether the indorsement is a genuine one or not.

The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by the fictitious indorsement, such as this was, than by a simple forgery. The determination of the character of any indorsement involves the ascertainment of two things: (1) the identity of the indorser, and (2) the genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name, until he had fully satisfied himself both as to the identity of the person and genuineness of his signature. Now, a careful banker may be deceived as to the signature of a person with whose identity he may be familiar, but he is less liable to be deceived where both the signature and the person whose signature it purports to be are unknown to him. In making the inquiry required in such case to warrant him in acting, he will learn that there is no such person or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he he could not be through his skill in such matters and on which bankers would ordinarily rely, for he would be without any standard of comparison, and he could have no knowledge of the handwriting of the supposed person for there is no such person. So that, if he acts at all, it must be upon the confidence he may place in the knowledge of some other person, and if he choose to act upon this, and make, instead of withholding payment, he acts at his peril and must sustain whatever loss may ensue. It is a saying frequently repeated in

The Doctor and Student, that "he who loveth peril shall perish in it." In other words, where a person has a safe way and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune.

The case of *Vagliano Brothers* v. *The Bank of England*, recently decided in England by the court of appeal, 23 Q.B.D. 243, and called to my attention since the foregoing opinion was written, fully supports the conclusion we have reached.

Judgment of the circuit court is reversed and that of the common pleas affirmed.

QUESTIONS

1. On what theory did the court proceed in holding that the plaintiff was entitled to recover the amount of the check from the defendant bank?
2. T represents to M that he is P. M knows neither T nor P personally, but knows of P by reputation. Relying on this representation of T, M draws a note payable to the order of P and delivers it to T. T indorses it in the name of P to H. H sues M on the note. What decision? How does this situation differ from the situation in the principal case?
3. D draws a check on the A Bank payable to the order of P and loses it. The A Bank in good faith pays the amount of the check to T. What are rights of D against the bank?
4. M, having no person in mind, makes a promissory note payable to "John Brown or order" and loses it. T finds and indorses the note in the name of John Brown to H. H sues M on the note. M pleads that the forgery of T is a complete defense to the action. What decision?
5. In the foregoing case, H knows that the name John Brown represents no real person. What decision in an action by H against M.?

SEABOARD NATIONAL BANK *v.* THE BANK OF AMERICA

193 New York Reports 26 (1908)

Pennock by fraud induced the Federal National Bank of Pittsburgh to draw and deliver to him a draft payable to the order of Carroll Brothers, to be charged to the account of E. V. Babcock & Co., by whom Pennock was employed. Carroll Brothers was a well-known firm in Pennsylvania, but Pennock did not intend that this firm should have any interest in the draft. The Federal Bank, ignorant of Pennock's intent, drew the draft on the plaintiff, a banking institution in New York, and delivered it to Pennock. Pennock indorsed the draft by writing "Carroll Bros." on the back and had it discounted

at the Mellon National Bank of Pittsburgh. The Mellon Bank forwarded the draft to its correspondent, the defendant, a bank in the city of New York. The defendant collected the draft of the plaintiff bank through the clearing house in the city of New York in the regular course of business.

Later E. V. Babcock & Co., discovering the irregularity of the transaction, notified the Federal National Bank to recredit its account with the amount, which was done. The Mellon National Bank, however, refused to make restitution to the Federal National Bank. Thereupon the Federal National Bank forwarded the draft to the plaintiff bank in New York and the plaintiff bank restored to the Federal Bank the amount charged to it on this draft. The plaintiff tendered the draft to the defendant and demanded a return of the amount of the instrument. The defendant bank refused to return the money and this action was brought for it.

Judgment was entered in favor of the plaintiff from which judgment an appeal was taken to the Appellate Division of the Supreme Court where the judgment was unanimously affirmed; and from such judgment of affirmance an appeal was taken to this court.

Chase, J. The Federal National Bank was a depositor with the plaintiff. The relation existing between the bank and a depositor being that of debtor and creditor the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. (*Critten* v. *Chemical National Bank*, 171 N.Y. 219.)

It is provided by the Negotiable Instruments Law that

> Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority. [L. 1897; chap. 612, sec. 42.]

If it was necessary for Carroll Brothers to indorse the draft before it could be paid by the plaintiff to the account of the Federal National Bank, then it was never so indorsed because Pennock's act was a forgery and wholly inoperative. The defendant cannot retain the money paid to it by the plaintiff upon such unindorsed draft for the very excellent reason that it had no title to the instrument upon which the money was paid.

It is further provided by the Negotiable Instruments Law as follows:

The instrument is payable to bearer:

1. When it is expressed to be so payable, or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or,

5. When the only or last indorsement is an indorsement in blank. [Sec. 28.]

It is claimed by the defendant that the draft was payable to a fictitious or non-existing person, and consequently writing the signature of Carroll Brothers on the back of the draft was not in legal effect a forgery and not necessary to protect the plaintiff in its payment.

Prior to the enactment of the Negotiable Instruments Law, the language of which makes it clear, if an instrument is to be deemed payable to bearer, although in form payable to a named person, that the intention to make the instrument payable to a fictitious or non-existing person must exist with the maker thereof, this court in *Shipman* v. *Bank of State of New York* (126 N.Y. 318), referring to the rule stated in the Revised Statutes, said:

We are of the opinion upon examination of the authorities cited by counsel on both sides that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person.

The court further says: "Bedell [the employee who signed the names of the payees] of course knew that the payees were fictitious, but he was not acting within the scope of his employment but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals."

Selover in his work on *Negotiable Instruments Law* (p. 70) says:

The doctrine that a check or bill made payable to a fictitious person is payable to bearer and negotiable without indorsement if the fictitious character of the payee was known to the parties, originated in England, and in each of the cases holding the doctrine the decision was based on the

fact that the acceptor knew at the time of his acceptance that the instrument was payable to a fictitious person. If the drawer or maker of an instrument did not know that the payee was a fictitious or non-existent person, and did not intend to make the paper payable to such person, paper payable to the order of such person cannot be treated as payable to bearer, for the intention of the maker or drawer is the test.

Bunker on *Negotiable Instruments* in his note to a section of the Negotiable Instruments Law of Michigan (sec. 11) corresponding to and the same as section 28 of the Negotiable Instruments Law in this state compares the Bills of Exchange Act of England (sec. 7) with the statute of Michigan, and says:

The difference between the two statutes is important. The element of knowledge is the distinguishing feature. Under the English statute the paper is payable to bearer if the payee be a fictitious or non-existing person. Under the American statute paper payable to a fictitious or non-existing person is not payable to bearer unless the maker or drawer knew that the payee was a fictitious or non-existing person. Under the English statute the fact governs; under the American statute the fact coupled with knowledge governs. Thus there has been carried into the two statutes the differences heretofore existing in the authorities.

In Crawford's *Annotated Negotiable Instruments Law* it is said in a note to section 28, referring to the case of *Shipman* v. *Bank of State of New York* (*supra*), and quoting from the opinion:

Hence if the maker or drawer supposes the payee to be an actually existing person [as for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist], the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn payable at a bank the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer and the indorsement is a forgery.

In Eaton and Gilbert on *Commercial Paper* it is said:

Under the common law a bill payable to a fictitious person or his order was neither in effect payable to the order of the drawer nor to the bearer unless it was shown that the circumstances of the payee being a fictitious person was known to the acceptor. To show that the acceptor was aware that the payee was a fictitious person, evidence is admissible of the circumstances under which he accepted other bills payable to fictitious persons.

The fictitiousness of the maker's direction to pay does not depend upon identification of the name of the payee with some existing person, but upon

the intention underlying the act of the maker in inserting the name. The rule as to an instrument payable to the order of a fictitious or non-existing person applies only to paper put in circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to the fictitious person.

Daniel on *Negotiable Instruments*, in a note to a section (sec. 139) in which he says that lack of knowledge of the maker of the fictitious character of the payee is not a defense against a bona fide holder, refers to a different rule in this state, and after calling attention to our revised statutes, says: "The Court of Appeals, construing this statute held that such paper cannot be treated as payable to bearer unless it was put in circulation by the maker with knowledge that the name of the payee does not represent a real person."

And further, in a note to the same section, he says: "But in New York by statute the maker is not bound to an indorsee even, unless he, the maker, knew of the fiction at the time of signing."

It does not appear that the Federal National Bank knew Carroll Brothers was a fictitious or non-existing person, or intended that the instrument should be payable to bearer.

The judgment should be affirmed, with costs.

QUESTIONS

1. On what theory did the court permit the plaintiff to recover the amount of the draft from the defendant?
2. Suppose that the Federal Bank had known the state of mind of Pennock when it drew the bill to Carroll Brothers, what would have been the decision in this case? Why?
3. T, a clerk employed by D, drew a check, payable to the order of X, a non-existent person. D signed the check in the usual course of business, supposing that P was some person to whom he owed money. T indorsed the check in the name of X to H. H presented the check to the A Bank, on which it was drawn, and received payment on it. D sues the bank for the amount thus deducted from his account. What decision?
4. T, a clerk employed by D, draws a check payable to the order of P, but intending it for himself. T represents to D that it is to be delivered to P in payment of goods which D has bought. D knows that he has bought goods from P and supposes that the check is for him. T indorses the instrument, in the name of P, to H. H presents the check to the A Bank and receives payment. D sues the bank for the amount of the check. What decision?

5. T forges D's name to a bill drawn on A, payable to X, a fictitious payee. He indorses it in the name of X to Q. A, thinking that D's signature is genuine and believing that the instrument is intended for a real person by the name of X, accepts the bill. Q indorses it to H. H sues A on the bill. A pleads forgery as a defense. What decision?
6. T forged D's name to a check on the A Bank, payable to the order of P, an actual person. T, however, did not intend that P should have any interest in the check. He indorsed the instrument in P's name to H, who received payment on it from the A Bank. (*a*) What are D's rights against the bank? (*b*) What are the bank's rights against H?
7. What provisions are found in the N.I.L. relating to fictitious payees? Does the N.I.L. change the common law on this point?

VANDER PLOEG *v.* VAN ZUUK

135 Iowa Reports 350 (1907)

McClain, J. The facts, established practically without dispute, are that the note for $2,000, naming the plaintiff as payee and the two defendants as joint makers with one Pothoven, on which this action is brought, was signed by these two defendants before it was fully completed, being at the time their signatures were affixed thereto a mere blank printed form; that these two defendants signed their names at the request of Pothoven, who was a partner of one of them in a mercantile business, on the representation that he might within a short time find it necessary to raise $150 or $200 for temporary use in the business; that Pothoven, being indebted on his individual account to plaintiff on a note for about $2,000, inserted plaintiff's name as payee, $2,000 as the amount to be paid, and the rate of interest, and delivered the instrument, filled out by him without authority, to the plaintiff, who thereupon surrendered to him the past due obligation. It appears in the evidence that the date was filled in by one W. G. Vander Ploeg, who frequently transacted business for the plaintiff, his father, and who knew the filling of the name of the payee and the amount by Pothoven before the note was delivered to plaintiff; but the final delivery was made directly by Pothoven to plaintiff, and there is a conflict in the evidence as to whether the son had any authority to act for the plaintiff in this particular transaction, or whether plaintiff had any knowledge that his son had so acted for him. If it were material to charge the plaintiff with the knowledge which his son had as to the act of Pothoven in filling out the note, the question should have been submitted to the jury, and we shall therefore dispose of the case without taking into account

any knowledge of or participation in the act of Pothoven in filling out the note, on the part of W. G. Vander Ploeg.

We have, then, the simple case of a note wrongfully filled out and delivered by one of the makers to the payee, without notice to the payee that the instrument as delivered is not filled out in accordance with the authority given by the other makers to the one who thus fills it out and delivers it. With reference to the filling of blanks in an instrument after the affixing of his signature by the maker sought to be charged, the Negotiable Instruments Acts (Acts 29th General Assembly, chap. 130; Code Supp. 1902, sec. 3060*a*) contains the following section:

Section 14, Blanks—when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

It is apparent from the last sentence of this section, that, if plaintiff is to be regarded as "a holder in due course," then the instrument is effectual in his hands for all purposes as though it had been filled up strictly in accordance with the authority given by defendants to Pothoven; i.e., defendants would not be allowed to contend as against a holder in due course that Pothoven did not have authority to fill the instrument out for $2,000; but under the sentence immediately preceding the last, if plaintiff is not to be treated as a holder in due course, then, as defendants became parties thereto prior to its completion, they are not liable to plaintiff because it was not filled up in accordance with the authority given. By section 191, the term "holder" is defined as meaning "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and by section 52, a "holder in due course" is defined as one who has taken the instrument complete and regular upon its face before maturity, without notice of previous dishonor, in good

faith and for value, and without notice that at the time it was negotiated to him, there was any infirmity or defect in the title of the person negotiating it. By section 59, "every holder is deemed *prima facie* to be a holder in due course"; and by section 57, "a holder in due course holds the instrument free from any defect of title or prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

It seems to us under the definitions and the applications thereof that the plaintiff was a holder of the note, but not a holder in due course. The latter term seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. In the ordinary case the payee of the instrument is the person with whom the contract is made, and his rights are not in general dependent on any peculiarities of the law of negotiable instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation, and not as an original party. This is the construction put on the same phrase used in the English Negotiable Instruments Act by Lord Russell, C.J. in *Lewis* v. *Clay*, 67 L.J.Q.B. 224, in which he says:

> A holder in due course is a person to whom after its completion by and as between the immediate parties the bill or note has been negotiated. In the present case, the plaintiff is named as payee, on the face of the promissory notes, and thereof is one of the immediate parties. The promissory notes held and sued on [by the person named as payee therein] have in fact never been negotiated within the meaning of the act.

In *Herdman* v. *Wheeler*, 1 K.B. (1902) 361, this language of Lord Russell is said to be a dictum, and it evidently is so, for in the further course of the opinion he points out that, without regard to the definition of that term which he gives, the result would be the same. But the court, in *Herdman* v. *Wheeler*, holds that the delivery of a note by one to whom it has been intrusted by the maker for the purpose of delivery after the filling in of the name of the payee, which has been left blank at the time of the affixing of the maker's signature, does not constitute a negotiation, and it seems to us clear that if there is in such case not a negotiation, then the payee whose name is thus filled in cannot be a holder in due course. In other words, we think that "holder in due course" should be construed as applicable only to one who takes the instrument by negotiation from another who is holder. Certainly,

in the case before us, Pothoven was not a holder of a promissory note, for as the instrument was delivered to him it was not a note at all but only a blank form of a note with the makers' name affixed. In *Guerrant* v. *Guerrant*, 7 Va. Law Reg. 639, a case at *nisi prius*, it is held that the holder filling a blank left in the instrument at the time of delivery acts at his peril as to the authority given by the maker signing the instrument with the name of the payee left blank, and putting it in the hands of another for final delivery, and says that, while this interpretation of the Negotiable Instruments Act involves a change in the law as recognized in that state before the act was passed, such interpretation is required by the language of the act itself. In *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140 (66 N.E. 646, 97 Am. St. Rep. 426), a case decided under the Negotiable Instruments Act as adopted in that state, it is held that one who signs a check, leaving the name of the payee blank, and instructs another to fill in the proper amount necessary to satisfy the debt of such signer to the payee named, is not bound by the check in the hands of such payee, if it is used by the person thus intrusted with it for the payment of his own debt to the creditor; the amount of such debt being correctly filled in by the creditor. In that case, the person to whom the check was intrusted exceeded his authority in using it for the payment of his own debt, instead of the debt of the signer of the check, and in this respect we think the case is analogous to the one before us. There is language in the opinion with reference to another check which was fully completed as to name of payee and amount, but was also used by the person to whom it was intrusted in violation of his authority in the payment of his own debt, which is not in harmony with our conclusion that the payee to whom the instrument is first delivered cannot be a holder in due course; but in this respect we are not inclined to follow the Massachusetts case.

We do not mean to say that in no case can the person named as payee in a negotiable instrument be the holder thereof "in due course." If A, purchasing a draft to be transmitted to B, in payment of A's debt to B, causes the draft to be drawn payable to B, no doubt A is the holder of such draft, and B taking it for value becomes a holder in due course. This was true before the passage of the Negotiable Instruments Act. *Armstrong* v. *American Exchange Nat. Bank*, 133 U.S. 433, (10 Sup. Ct. 450, 33 L. Ed. 747); *Watson* v. *Russell*, 3 B. & S. 34, affirmed in 5 B. & S. 968. There is no reason to think the situation of the parties to such a transaction is different under

the act. No doubt the payee named in a promissory note might under similar circumstances be a holder in due course. This is the theory on which the court in *Boston Steel & Iron C.* v. *Steuer*, *supra*, holds the payee named in the first of the checks considered in that case to be a holder in due course; but we are unable to understand how the rule is applicable under the facts of the case, for the check was not delivered by the drawer as a valid and complete instrument to the person intrusted with it, but it was given into his hands only for delivery to the payee in extinguishment of the drawer's debt to the payee. Until thus delivered to the payee, it had no validity for any purpose. Before such delivery, the person intrusted was a holder, but not, as we think, a holder in due course.

The conclusion which we reach is perhaps different from what it would have been had the Negotiable Instruments Acts not been passed. It has been regarded as well-settled law that one who intrusts an incomplete instrument to another to be completed by him and delivered is bound to anyone who relies in good faith on the genuineness of such instruments, although the person intrusted with completing and delivering the instrument has exceeded his authority; and this rule has been held applicable in favor of the payee as well as the transferee of such an instrument. *Chariton Plow Co.* v. *Davidson*, 16 Neb. 374 (20 N.W. 256); *Androscoggin Bank* v. *Kimball*, 10 Cush. 373; *Johnson Harvester Co.* v. *McLean*, 57 Wis. 258 (15 N.W. 177, 46 Am. Rep. 39); *Fullerton* v. *Sturges*, 4 Ohio St. 530; *Dierck* v. *Roberts*, 13 S.C. 338; *Frank* v. *Lilienfeld*, 33 Grat. (Va.), 377; *Davis* v. *Lee*, 26 Miss. 505, (59 Am. Dec. 267); *Russell* v. *Langstaffe*, 2 Doug. (K.B.) 514; 1 Daniel, *Negotiable Inst.* (5th ed.), sections 142, 147, 769, 769*a;* 1 Randolph, *Commercial Paper* (2d ed.), section 181; 2 Randolph, *Commercial Paper* (2d ed.), section 986; 3 Randolph, *Commercial Paper* (2d ed.), section 1875; Norton, *Bills and Notes* (2d ed.), 181; Clark and Skyles, *Agency*, section 60. Indeed, it seems to have been thought immaterial whether or not the person to whom the instrument is made payable and delivered had knowledge that it had been filled out so as to make it an effectual instrument, by one to whom it was intrusted by a maker who had signed it to be filled out and delivered, for it is said that the holder is entitled to assume that the person in whose hands it was placed for final execution had authority to do what he did do, making an effectual instrument, and is not charged with knowledge of any limitations upon such authority. *Johnson* v. *Blasdale*, 1 Smedes & M. (Miss.) 17 (40 Am.

Dec. 85); *Joseph* v. *First National Bank*, 17 Kan. 256; *Huntington* v. *Branch Bank*, 3 Ala. 186; 1 Daniel, *Negotiable Inst.* (5th ed.), section 843; Mechem, *Agency*, section 394. This principle is illustrated by the rule, well settled in this state and elsewhere, that a surety who signs an instrument and intrusts it to the principal maker for delivery is bound although the principal delivers it in violation of conditions or instructions imposed by the surety on the principal, which were not known to the payee. *Sawyers* v. *Campbell*, 107 Iowa, 397; *Micklewait* v. *Noel*, 69 Iowa, 344; *Davis Sewing Machine Co.* v. *Buckles*, 89 Ill. 237; *Smith* v. *Moberly*, 49 Ky. 266 (52 Am. Dec. 543); *Ward* v. *Hackett*, 30 Minn. 150 (14 N.W. 578, 44 Am. Rep. 187); *Craig* v. *Hobbs*, 44 Ind. 363; Brandt, *Suretyship* (3d ed.), section 457.

But we must take the Negotiable Instruments Act as it is written, and, while the general purpose was to preserve the existing law so far as it was uniform, yet in many respects in which there was a conflict or doubt under the authorities the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected. With reference to the language which we have been considering in this very case, taken substantially from section 20 of the English Bills of Exchange Act, the court says, in *Herdman* v. *Wheeler, supra:*

We have been very reluctant to come to the conclusion that the judgment in favor of the defendant in this case was right, because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular on the face of it, honestly and for value; but, after carefully considering the matter, we have come to the conclusion that we should be unfairly straining the words if we did not hold that "negotiated," in the proviso at the end of the twentieth section, meant transferred by one holder to another. It is to be observed that the Bills of Exchange Act, in section 2 [sec. 191 of our act] defines "issue" as meaning "the first delivery of a bill or note, complete in form, to a person who takes it as holder." There is therefore a technical word defined and used in the act to mean that which [the person intrusted with the completion and delivery of the instrument] did here, and the appropriate words to have used in the proviso to section 20, if it had been intended to include this case, would have been, "if such instrument after completion is issued or negotiated to a holder in due course." Those are not the words, and, although we think that the present case might possibly have been decided in the plaintiff's favor before the Bills of Exchange Act was passed, we think that we cannot consistently with the meaning of "issue" and "negotiate"

in the act hold that the present case is covered by the words used in the proviso. That being so, it falls within the first part of the second subsection of section 20 [i.e., the sentence of our section preceding the last], and, as the authority of the defendant was not strictly followed, he is not liable.

We see no escape from the conclusion that, under the statute, plaintiff, being not a holder in due course, but the person to whom the note was made payable, and to whom its delivery as an effective instrument was first made, took it subject to the defense that Pothoven had no authority to fill in $2,000 as the amount of the note and deliver it to plaintiff.

The judgment of the trial court is therefore affirmed.

QUESTIONS

1. What was the defense relied on by the defendants in this case? Was it a real defense or a personal defense?
2. Precisely why did the court deny the plaintiff the right to recover on this instrument?
3. Would the court have reached the same decision, if this case had arisen under the common law instead of arising under the N.I.L.?
4. D draws a check for $500, omitting the name of the payee, delivers it to T and directs him to use it in buying goods for D. T inserts P's name as payee and transfers the instrument to him in payment of a debt which he, T, owes P. P indorses the instrument to H. H sues D on it. What decision? Is H a bona fide purchaser? Is he a holder in due course?
5. Both D and T are indebted to P. D draws a check to the order of P and instructs T to deliver it to P in payment of D's debt. T delivers the check to P in payment of his own debt. P sues D on the original debt. D pleads payment. (*a*) What decision at common law? (*b*) What decision under the N.I.L.?
6. D delivers another check to T, payable to the order of P, with the amount left blank, and directs T to fill it in for an amount not to exceed $200 and to deliver it to P. In the presence of P, T fills in the check for $400 and delivers it to P. P has no notice of the limitation on T's authority. P sues D on the check for $400. (*a*) What decision under the common law. (*b*) What decision under the N.I.L.?
7. In the foregoing case, P takes the check in ignorance of the fact that the amount had been filled in by T. Is he a bona fide purchaser for value under the common law? Is he a holder in due course under the N.I.L.?
8. Do you understand that the principal case decides that a payee of a negotiable instrument can under no circumstances be a holder in due course under the N.I.L.?

SWIFT *v.* TYSON

16 Peters' United States Reports 1 (1842)

Story, J. This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that court. The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of $1,540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the acceptance and indorsement of the bill were admitted and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared, that Swift took the bill, before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a bona fide holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary further to state them. The defendant then offered to prove that the bill was accepted by the defendant, as part consideration for the purchase of certain lands in the state of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of plaintiff to the bill of discovery. The judges of the circuit court thereupon divided in opinion upon the following point or question of law—whether, under the facts last mentioned, the defendant was entitled to the same defense to the action, as if the suit was between

the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant, and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt, that a bona fide holder of a negotiable instrument, for a valuable consideration, without any notice of facts which impeach its validity, as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of a negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration, without notice, for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish, by way of defense, satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff.

In the present case, the plaintiff is a bona fide holder, without notice, for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration, in the sense of the general rule applicable to negotiable instruments.

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration, in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business, for a valuable consideration, before it becomes due; we are prepared to say that receiving it in payment of, or as security for, a pre-existing debt, is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed

such a valuable consideration? It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But to establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as a security for, pre-existing debts, without letting in all the equities between the original and antecedent parties and the value and circulation of such securities, must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereon often at a ruinous discount, to some third person, and then, by circuity, to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably, more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of *Coolidge* v. *Payson*, 2 Wheat. 66, 70, 73, and *Townsley* v. *Sumnall*, 2 Pet. 170, 182, are directly in point. In England the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans* v. *Van Mierop*, 3 Burr. 1664, this very point was made, and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us, for the bill of exchange was there drawn in discharge of a promise made by him to accept, before the bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the

whole court held the plaintiff entitled to recover. From that period downward there is not a single case to be found in England in which it has ever been held by the court that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental *dicta* have been sometimes relied on to establish the contrary, such as the *dictum* of LORD CHIEF JUSTICE ABBOTT, in *Smith* v. *DeWitt*, 6 Dow. & Ryl., 120, and *De la Chaumette* v. *Bank of England*, 9 Barn. & Cres. 209, where, however, the decision turned upon very different considerations.

In the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In *Brush* v. *Scribner*, 11 Conn. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a bona fide holder against all the antecedent parties to a negotiable note. There is no reason to doubt, that the same rule has been adopted and constantly adhered to in Massachusetts, and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed that whatever constitutes a valid and valuable consideration in other cases of contract, to support titles of the most solemn nature, is held *a fortiori* to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a bona fide holder for a pre-existing debt of a negotiable instrument is not affected by any equities between the antecedent parties where he has received the same, before it became due, without notice of any such equities. We are all, therefore, of opinion that the question on this point, propounded by the circuit court for our consideration, ought to be answered in the negative. and we shall accordingly direct it so to be certified to the circuit court.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. M promises in writing to pay to the order of P the sum of $500. P sues M on the note. M defends on the ground that there was no consideration for the promise. What decision?

3. In the foregoing case, P indorses the note to Q as a gift. Q sues M on the note. What decision?
4. Q indorses the note to H, who pays value therefor. H sues M on the note. M pleads lack of consideration as a defense. What decision?
5. M executes a note to P who pays value for it. P indorses it to H as a gift. H sues M on the instrument. M contends that H cannot recover on it because he is not a purchaser for value. What decision?
6. M executes a note to the order of P in payment of a debt which M owes to P. P indorses the note to Q. P sues M on the note. M contends that H cannot recover because he is not a purchaser for value. What decision?
7. In the foregoing case, M executes the note to P, not in payment of the precedent debt, but as security for it. P sues M on the note. M contends that H is not a purchaser for value. What decision?
8. What is the justification for the doctrine announced by the court in the principal case?
9. What provisions are found in the N.I.L. concerning value and consideration in negotiable instruments?

DRESSER *v.* MISSOURI RAILWAY CONSTRUCTION COMPANY

93 United States Reports 92 (1876)

Hunt, J. This action is brought upon three several promissory notes, made by the Missouri and Iowa Railway Construction Company, dated November 1, 1872, payable at two, three, and four months, to the order of William Irwin, to the aggregate amount of $10,000. The defense is made that they were obtained by his fraudulent representations.

But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is bona fide, the question is as to the amount of recovery. Under the ruling of the court he recovered $500. His contention is that he is entitled to recover the face of the note with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury that if they believed, from the evidence, that the plaintiff purchased the notes in controversy of William Irwin for a valuable consideration on the first of November, 1872, and paid $500, part of the consideration, on the twenty-first of January, 1873, before any notice of any fraud in the contract, he is entitled to recover the

whole amount of the notes; and the court refused this instruction. Butt he court charged the jury—

> That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged, and that if the defendants failed to satisfy the jury of that fact, the whole defense fails.
>
> That, if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid $500 upon the notes without notice of the fraud, and that after receiving notice of the fraud, the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*, that is, to the amount paid before he received notice.

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might, by its transfer, subject him to liability. His agreement seems to have been an oral one merely—to pay the amount agreed upon, as should be required—and he had paid $500, and no more, when notice of the fraud was brought home to him.

The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true, and if the plaintiff had bought the notes in suit for $500, before maturity and without notice of any defense, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them. *Fowler* v. *Strickland*, 107 Mass. 552; *Park Bank* v. *Watson*, 42 N.Y. 490; *Bank of Michigan* v. *Green*, 33 Iowa, 140. The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which $500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it, certainly, that he should not be permitted, by performing it, to obtain from the defendant's money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in instalments

and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterward. *Barnard* v. *Campbell*, 53 N.Y. 73; *Lewis* v. *Bradford*, 10 Watts, 82; *Juvenal* v. *Jackson*, 2 Harris, 529; *idem*, 430; *Youst* v. *Martin*, 3 S. & R. 423, 430.

The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a bona fide purchaser.

No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing. It has our concurrence and is affirmed.

QUESTIONS

1. Is there any justification for the doctrine announced by the court in this case?
2. P by fraud induces M to execute a note to his order in the sum of $100. P sells and indorses the instrument to H for $80. H sues M on the note. M pleads the fraud of P as a defense. What decision?
3. Suppose in the principal case that the plaintiff had agreed to pay only $500 for the notes, what would have been the decision of the court?
4. P is the payee of a note executed by M in the sum of $150. P indorses it to H as security for a debt of $50 which P owes H. What are the rights of H on the note?
5. Assume, in the foregoing case, that P secured the note from M by fraud. What are the rights of H against M on the note?
6. M executes a note in the sum of $100 for the accommodation of P. P sells it to H for the sum of $75. Assuming that H knew of the character of the instrument when he received it, what are his rights against M on the note?
7. In the foregoing case, H sells the instrument to R for $95. Assuming that R knew that the note was accommodation paper when he took it, what are his rights on it against M?
8. P procures two notes by fraud from M, each in the sum of $500. He sells one to Q for $400. Q, when he has paid $390, learns of the fraud. P sells the other to X for $390. X pays this amount in ignorance of the fraud. What are the rights of Q and X, respectively, against M?

ARND *v.* AYLESWORTH

145 Iowa Reports 185 (1909)

Action at law upon a promissory note. There was a directed verdict and judgment for the plaintiff, and defendant appeals. Reversed and remanded for a new trial.

WEAVER, J. The case as made presents evidence tending to sustain the defendant's claim that the note had its inception in fraud. If defendant testifies truthfully (and her credibility was a matter for the jury to determine) she was the victim of rank imposition, devised and executed by Baxter and Recroft, with the aid of others, whereby she was induced to purchase a lot of very undesirable land at a grossly exorbitant price. Assuming the sufficiency of this showing, as we must for the purposes of this appeal, the burden was cast upon the plaintiff to prove that Mrs. Way, or some person under whom she claims, acquired title to the paper in due course. Code Supp. 1907, sections 3060*a*–59. To remove this burden she was required to show by competent evidence: (1) that she became the holder of the note before it was overdue and without notice that it had been previously dishonored, if such was the fact; (2) that she took it in good faith for value; and (3) that at the time it was negotiated she had no notice of any infirmity in the note or defect in the title of the person negotiating it. Code Supp. 1907, sections 3060*a*–52. And to justify the court in directing a verdict in her favor the testimony of the bona fide character of her holding must not only be without substantial evidence, tending to impeach it, but the showing in its support must be so clear and unequivocal as to leave no room for difference of opinion concerning it among fair-minded men. *McNight* v. *Parsons*, 136 Iowa, 397.

Does the record make such a case for the appellee? The statute provides that to constitute notice of infirmity in a negotiable instrument or of a defect in the title of the person negotiating it the person to whom it is negotiated must have had actual knowledge thereof or knowledge of such facts that his action in taking the instrument amounts to bad faith. Code Supp. 1907, sections 3060*a*–56. This provision simply puts in statutory form a rule of the common law as previously interpreted by this and many other courts. *Keegan* v. *Rock*, 128 Iowa, 43. In some of the states it seems to have been held that one who takes a transfer of negotiable paper under circumstances to put a reasonable person on inquiry as to defenses

against it, is considered as having notice of the facts which such inquiry would develop; but the more general trend of the decisions from an early day has been to the effect that mere ground of suspicion as to possible defects in the title of the negotiator or of the existence of defenses to the instrument negotiated is not the equivalent of notice to the transferee, and, to be regarded as an innocent purchaser he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though, if the negligence be of a marked or gross character, it may be competent to establish the *mala fides* of the purchase. That which will charge the paper in his hands with prior equities and defenses is actual or direct notice of the facts, or, in the absence of such notice or knowledge, the existence to his notice of such facts or circumstances that his action in taking the paper amounts to bad faith. Of this class of cases an illustrative example is *Goodman* v. *Simonds*, 61 U.S. 343 (15 L. Ed. 934), which is a leading case upon the subject. The court, there, speaking by Clifford, J., and laying down the rule as it has frequently been recognized in this jurisdiction, held that mere ground of suspicion known to the purchaser of negotiable paper before maturity, or even negligence on his part, is not in itself sufficient to charge him with notice, and proceeds also to speak of the limitations to be observed in the application of such rule. It says:

Whether a party had such knowledge is a question of fact for the jury, and, like other disputed questions of *scienter*, must be submitted to their determination under the instructions of the court; and the proper inquiry is: Did the party seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction is attended by bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly with respect to the antecedent parties when he takes negotiable paper in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke in 16 M. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith.

The courts accepting the rule of the *Goodman* case have not been uniform in their holdings as to where the burden of proof lies in an action by the purchaser of negotiable paper tainted with fraud in its inception, but it has long been the doctrine in this and many other

states that, such fraud being shown, the burden is not upon the defendant to show the plaintiff's bad faith in the purchase, but is upon the plaintiff to affirmatively establish his good faith in that transaction. *Keegan* v. *Rock*, 128 Iowa, 39, and cases there cited. It is important that this distinction be borne in mind in the consideration of cases like the one at bar, for it is quite possible that the testimony as a whole may be insufficient to justify an affirmative finding of bad faith on the part of the plaintiff, and still not be so conclusive of his good faith as to require a withdrawal of the question from the jury. *Cox* v. *Cline*, 139 Iowa, 128; *Mace* v. *Kennedy*, 68 Mich. 389 (36 N.W. 187). It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most instances, cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law.

These authorities, and many others which might be cited, uphold with such unanimity the rule, as we have stated it, that neither negligence nor knowledge of suspicious circumstances, nor failure to inquire into the consideration will in or of itself be bad faith in a holder of negotiable paper who purchases it in the ordinary course of business, but they are equally consistent in holding that the existence of such facts may be evidence of bad faith sufficient to take the question to the jury, and especially is this so where the burden is upon the holder to establish the innocent character of his purchase. Applying the law thus stated to the record in the instant case, we are of the opinion that the trial court erred in directing a verdict for the plaintiff.

For the reasons hereinbefore indicated, the judgment appealed from is reversed, and the cause remanded for a new trial.

QUESTIONS

1. Why should the law protect a purchaser without notice and refuse to protect a purchaser with notice?
2. When it is said that the law does not protect a person as a bona fide purchaser when he has notice, what is meant by *notice?* Does it mean that the holder has actual knowledge of some defect or infirmity in the title of the instrument? Or does it mean that he has knowledge of facts which, if investigated, would reveal some defect or infirmity?
3. P holds a note payable to "P, trustee for C." He transfers the note to H in satisfaction of a debt which he owes H. H sues M on the instrument. M contends that H cannot recover because he is not a bona fide purchaser without notice. What decision?
4. M, induced by the fraud of P, executes a note to the order of the latter. P indorses it to Q, a bona fide purchaser for value without notice of the fraud. Q indorses the note to H. H sues M on the instrument. M proves by way of defense that H, when he bought the note, had actual knowledge of the fraud perpetrated on M. What decision?
5. H buys a note from P. At the time of the transaction he knows facts which, if investigated, would have shown that P secured it from M by fraud. He negligently but innocently failed to make the investigation. H sues M on the note. M contends that H cannot recover on it because he is not a bona fide purchaser. What decision?
6. In the foregoing case, H fails to make the investigation because he is afraid that it will reveal some defect or infirmity in P's title to the instrument. What decision in an action by P against M on the note?
7. H is declaring on a note as a bona fide purchaser. Must he show that he acquired the instrument in good faith and without notice of infirmities in the title? Or must the obligor show that the holder had notice or that he bought it in bad faith?

DEWITT *v.* PERKINS

22 Wisconsin Reports 473 (1868)

Action on defendant's promissory note. The jury, by direction of the court, found for the plaintiff; and the defendant appealed from the judgment. The question in dispute will sufficiently appear from the opinion.

DIXON, C. J. The plaintiff, knowing the defendant, and that he was in fair credit and able to respond, purchased, shortly before its

maturity, a promissory note against him for three hundred dollars and interest for six months, paying therefor only the sum of five dollars. As between the defendant and the payee, the note was invalid for want of consideration. Is the plaintiff a *bona fide holder for value*, so as to protect him against the defense of a want of consideration? We answer, no. The consideration paid by him was merely nominal. It is as if the note had been given to him, and he should claim the protection afforded a bona fide holder for value. It appears on the face of the transaction that it was not a negotiation of the note in the usual course of business, but that the sum exacted on the one side and paid on the other was to give that the semblance of a sale, which otherwise was intended as a mere gift, or what is worse, a shift to get the note out of the hands of the payee so as to cut off the defense of the maker, for the payee's benefit. Either view is equally fatal to the action of the plaintiff, provided the defense of a want of consideration is established.

Again, the buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of *mala fides*. It is constructive notice of the invalidity of the note in the hands of the seller—such as to put the purchaser upon inquiry, which if he fails to make, he acts at his peril. *Brown* v. *Taber*, 5 Wend. 566; *Mathews* v. *Poythress*, 4 Ga. 287, 299 *et seq.* and cases cited; *Anderson* v. *Nicholas*, 28 N.Y. 600; *Whitbread* v. *Jordan*, 1 Younge & Collyer, (Exch.) 303–28, *Jones* v. *Smith*, 1 Hare, 68; 1 Parsons on *Notes and Bills*, 254, 259–60. The proof offered to show a failure of consideration should have been received, and the case submitted to the jury on this ground.

Judgment reversed and a new trial awarded.

QUESTIONS

1. What was the defect in the title to the instrument under consideration in this case? Did the plaintiff have actual knowledge of this defect? If not, why was the judgment of the lower court in his favor reversed?
2. The court said that the purchase of the note by the plaintiff under the circumstances was strong if not conclusive evidence of *mala fides*. What does the court mean by this?
3. The court said also that the plaintiff had constructive notice of the infirmity in the title of the instrument when he bought it. What does the court mean by *constructive notice?*
4. P induces M by fraud to execute a note to his order. P indorses it *sans recourse* to H. H sues M on it. M contends that P's indorse-

ment "without recourse" was constructive notice to H that there was a defect in P's title to the instrument. What decision?

5. P loses a check indorsed in blank. T finds the check. The bank on which it is drawn pays it to T without requiring T to identify himself. P sues the bank in trover for conversion of the check. The bank contends that it is a bona fide purchaser of the instrument and not liable in trover. How should the court instruct the jury?
6. M executes a note to the order of P, payable in five instalments. P indorses the instrument to H who knows that the first instalment is due and unpaid. H makes no inquiries as to why this instalment is unpaid. In an action by H against M on the note, M sets up as a defense the fraud of P in securing the instrument. What decision?
7. P, treasurer of the M Company, executes a corporation note payable to the order of himself. P indorses the note to H in satisfaction of a debt which he personally owes to H. H sues the M Company on the note. How should the court instruct the jury?
8. The president of a corporation, having no authority to do so, indorsed, in payment of an individual debt to H, a check payable to the order of the corporation. H presents the check to the bank on which it is drawn and receives payment thereon. The corporation is suing H for the proceeds of the check. How should the court instruct the jury?

CHESTER *v.* DORR

41 New York Reports 279 (1869)

This was an action by the plaintiff as indorsee of eight notes, all in the following form:

Northfield, January 15, 1858

$500.00.

Eight months after date, we promise to pay to the order of James A. Dorr, five hundred dollars, at No. 34 Pine Street, New York City.

THE NORTHFIELD BRICK COMPANY

By James A. Dorr, Treasurer

Indorsed,
Protest waived,

James A. Dorr

These notes were made, indorsed, and delivered to one Myers, a creditor of the company, for his accommodation, and without consideration. Myers held the notes at maturity. Some two or three years after the notes had matured and had been dishonored, he transferred them to the plaintiff in this action. Judgment was given for the plaintiff and the defendant appealed.

WOODRUFF, J. JUSTICE STORY, in his treatise on *Promissory Notes*, section 178, thus states the difference between the legal effect of the transfer of a promissory note, before and after maturity:

> If the transfer is made before the maturity of the note, to a *bona fide* holder, for a valuable consideration he will take it free from all equities between the antecedent parties, of which he has no notice.
>
> If the transfer is after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not. But, it is not to be understood, by this expression, that all sorts of equities existing between the parties, from other independent transactions between them are intended; but only such equities, as attach to the particular note, and as between those parties, would be available to control, qualify, or extinguish any rights arising thereon.

The learned author gives this as the final conclusion from the numerous cases cited by him, an examination of which shows that it is only after some difference of opinion that it has come to be deemed settled. Or, as Mr. Chitty says, of the opinion of BULLER and ASHURST, J.J. in *Brown* v. *Davis* (3 T.R. 80), expressed, when Lord Kenyon doubted its broad extent, "this latter opinion is now the law." That opinion was to the effect "that where a note is overdue, that alone is such a suspicious circumstance, as makes it incumbent upon the party receiving it to satisfy himself that it was a good one, otherwise much mischief might arise." "If a note indorsed, be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that, by law, it is not negotiable, yet, certainly it is out of the common course of dealing, and does give rise to suspicion. Generally, when a note is due, the party receiving it, takes it on the credit of the person who gives it to him."

The foundation of the rule, which distinguishes commercial paper from ordinary common-law choses-in-action, is in harmony with the law thus stated; the holder of the former is protected against any inquiry into its previous history and is warranted in giving it full faith, according to its tenor because commercial convenience and the importance of the free and unembarrassed use of commercial credits required it; and on this, the mercantile customs which ripened into the law merchant were founded. These reasons, however, could have no application to paper which had been dishonored. The credit it was adapted to invite is spent, and the very fact of dishonor is inconsistent with the purposes which the rule was intended to subserve.

The rule is simple and convenient of application, is in no sense inconsistent with the usefulness of negotiable paper for the purposes for which it is intended, and, as it seems to me, is a just security against mischief and fraud.

In the terms in which it is stated above, it includes the defense of want of consideration, whenever that renders the note invalid in the hands of him who holds it, when it becomes due. Such want of consideration is an inherent defect in the contract itself. Or, in the language of the rule, attaches to the note itself, in the hands of one for whose accommodation a note is made, and does not, like a set-off, or other collateral matter apart from the note arise out of an independent transaction.

The finding of the referee on that subject is conclusive in this court, and that finding is that the indorsement was made without consideration at Myers' request and to enable Myers to use the notes. This is but a statement that the defendant indorsed the notes for the accommodation of Myers. It was so treated in the court below, and it is an unwarranted assumption to say that possibly the defendant had some other inducement to indorse the notes in order that the plaintiff might accept the notes and give credit to the maker thereof, who was his debtor.

Judgment reversed.

QUESTIONS

1. P secures a negotiable promissory note from M by fraud. After the note matures, P indorses it to H, who pays value for it and has no notice of the fraud practiced on M. H sues M on the note. M sets up the fraud of P as a defense. What decision?
2. In the foregoing case, P indorses the note before maturity to H, who pays value for it and is without notice of the fraud. After maturity, H sells the note to X who has no notice of the fraud. X sues M on the note. M sets up the fraud of P as a defense. What decision?
3. Would your answer have been the same in the foregoing case if it had appeared that X, when he bought the note from H, had notice of the fraud practiced by P on M?
4. Why should the protection to bona fide purchasers be withdrawn as to negotiable instruments transferred after maturity?
5. The court in this case said that an instrument, negotiable in its creation, continues negotiable after maturity. What is meant by this statement?
6. Summarize the rules for determining when an instrument is overdue.
7. When is a certificate of deposit overdue? When does an instrument payable on demand mature?

d) Liability of Parties to Negotiable Contracts

CARTER *v.* SMITH

9 Cushing's Massachusetts Reports 321 (1852)

SHAW, C. J. This is an action of *indebitatus assumpsit*, upon a promissory note, made by the defendant to the plaintiff or his order, and payable at either of the banks in Portland, Maine.

In the court of common pleas no evidence was adduced of any demand upon the defendant at any bank, nor did the defendant offer to prove that he was ever present at any bank with the money to pay the note; but the defendant objected that such a demand must, in the first instance, be proved. The court overruled the objection, and a verdict having been rendered for the plaintiff, the case comes before us upon exceptions to such ruling of the court.

Upon the question whether, in a suit upon a promissory note against the promisor or upon a draft against the acceptor, a demand must be proved, there have been conflicting decisions in England; the Court of King's Bench deciding one way, and the Court of Common Pleas, or the Exchequer, the other. An act was finally passed to decide the question.

It was early held here, in *Ruggles* v. *Patten*, 8 Mass. 480, that a demand was not necessary. It has been so held in other states, and in the Supreme Court of the United States, *Wallace* v. *McConnell*, 13 Peters, 136. JUSTICE STORY, in his work on promissory notes and bills of exchange, says he dissented from the opinion of the court in that case, but there is no note of his dissent preserved in the report.

The essence of the liability of the promisor is his indebtment to the holder of the note. The note is considered as an admission of debt, and that debt is not discharged merely by the omission to demand payment of it.

The want of a demand has its effect with regard to parties collaterally liable, like a drawer or indorser. To charge them, the holder must present his note to the acceptor, or maker, when it is due, and give them notice if it is not paid. It is sufficient for this purpose, where the note or draft is payable at a bank, that it be presented there, and that the banker finds, upon examining his books, that he has no funds to pay it.

But it is contended that the presence of the promisor at the bank with his money is in the nature of a tender. This may be so, and the tender may be good, if proved, but if the defendant means to rely on

it, he must either plead it or give due notice otherwise of such intention. If he pleads it, and that he has always been ready to pay and proves it, it may bar the costs, but, as in all cases of tender, he must also bring the money into court. This view is substantially confirmed by the case of *Payson* v. *Whitcomb*, 15 Pick. 462. This would be the case if the note were payable at a place certain. But this is payable at any bank in Portland. We do not know how many banks there may be in that city, but the expression "either of the banks in Portland" indicates more than one.

Such a promise may impose a duty on the holder, under certain circumstances, to designate at what bank the note shall be paid; but it will be sufficient to decide that question when it shall arise.

The exception is overruled, and judgment will be entered on the verdict; and, as the exceptions appear to us to be only intended for delay, the plaintiff is entitled to double costs.

Exceptions overruled.

QUESTIONS

1. H is suing M on a note payable at the A Bank. M pleads that H did not demand payment of the note for more than a year after its maturity. What decision?
2. M proves by way of defense that he was at the A Bank on the day of maturity with money, ready and willing to pay the note. What decision in an action by H on the instrument?
3. H sues M on an instrument payable on demand. M pleads by way of defense that H never demanded payment of the note. What decision?
4. M executes his note to the order of P. H sues M on the instrument. M pleads in defense that P is an infant and had no capacity to indorse the instrument. What decision?
5. Examine the case of *Armstrong* v. *The National Bank*, *supra*, page 386, and be prepared to answer why the maker of the note did not admit the existence of the payee and his capacity to indorse.
6. What is the scope of the promise of the maker of a promissory note? of an acceptor of a bill of exchange?

McGREGORY *v.* McGREGORY.

107 Massachusetts Reports 543 (1871)

This was an action by a holder of promissory notes against the makers thereof. It was alleged and proved that the notes had been destroyed by fire. After verdict for the plaintiff he filed a bond for

protection of the defendants from liability on the lost notes, to the approval of the judge.

Gray, J. Destruction by fire is one mode by which property may be lost, and an allegation that a note has been lost is fully supported by proof that it has been destroyed by fire.

It is well settled in this commonwealth, that an action at law may be maintained on a lost promissory note, whenever a bond of indemnity will afford complete protection to the defendant; and that such an action may be maintained against the maker of such a note, upon filing a sufficient bond of indemnity. All the makers of the notes described in these three counts are defendants in this action; and they do not stand like an indorser of a promissory note, who is entitled, upon taking it up, to the possession thereof, in order that he may have his recourse over against the maker or negotiate it again; or like the acceptor of a bill of exchange, who may need it as a voucher in settling his account with the drawer. *Fales* v. *Russell*, 16 Pick. 325; *Almy* v. *Reed*, 10 Cush. 421; *Boston Lead Co.* v. *McGuirk*, 15 Gray, 87; *Tower* v. *Appleton Bank*, 3 Allen, 387; *Tuttle* v. *Standish*, 4 Allen, 481; *Savannah National Bank* v. *Haskins*, 101 Mass. 370.

Judgment on the verdict for the plaintiff.

QUESTIONS

1. In this case it was alleged and proved that the notes sued on had been destroyed by fire. Why then compel the plaintiff to put up a bond of idemnity as a condition of recovery? If they are lost, is not the maker sufficiently protected?
2. H is suing on a note executed by M. M contends that H cannot recover because he does not produce the note. H proves that the note is lost and contends that M cannot be prejudiced by the non-production of the instrument because it is overdue. What decision?
3. H is suing on a note executed by M. He alleges and proves that he accidentally lost the note, indorsed to his own order. What decision?
4. H sues M on a note and proves that the note was accidentally destroyed by fire. He offers a bond of indemnity to protect M against any loss in the future. M contends that he is entitled to the possession of the note even though the bond may protect him against possible loss. What decision?
5. H is suing A on a bill accepted by the latter. H alleges and proves that the bill was accidentally destroyed and offers a bond to protect A against loss. What decision?
6. H is suing P, as an indorsee of a check. H alleges and proves that the check was accidentally lost and offers a bond to indemnify P against loss. What decision?

PRICE *v.* NEAL

3 Burrow's King Bench Reports 1354 (1762)

It was an action upon the case brought by Price against Neal, wherein Price declares that the defendant Edward Neal was indebted to him in £80 for money had and received to his, the plaintiff's, use and damages were laid to £100. The general issue was pleaded, and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows: "Leicester, 22d November, 1760. Sir, Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane Cannon-Street, London;" indorsed "R. Ruding; Anthony Topham, Hammond and Laroche. Received the contents, James Watson and son. Witness Edward Neal."

That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40 and take up the said bill; which was done accordingly.

That another bill was drawn as follows: "Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-Street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "accepted John Price:" and that the plaintiff wrote on the back of it, "Messieurs Freame and Barclay, pray pay forty pounds for John Price."

That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up. Both these bills were forged by one Lee, who has been since hanged for forgery. The defendant Neal acted innocently and bona fide, without the least privity or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff and assessed damages £80 and costs 40*s.* subject to the opinion of the court upon this question: "Whether the plaintiff, under the circumstances of the

case can recover back, from the defendant, the money he paid on the said bills, or either of them."

LORD MANSFIELD. It is an action upon the case for money had and received to the plaintiff's use. In which action the plaintiff cannot recover the money unless it be against conscience in the defendant to retain it, and great liberality is always allowed in this sort of action.

But it can never be thought unconscientious in the defendant to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid, without the least privity or suspicion of any forgery.

Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it, but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and bona fide discounts it. The plaintiff lies by for a considerable time after he has paid these bills and "then found out that they are forged," and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first, and he paid the whole value, bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant.

Rule: That the *postea* be delivered to the defendant.

QUESTIONS

1. One of the bills of exchange in question in this case had been accepted by Price. Could he have refused to pay this bill to the holder at its maturity? What is the engagement of the drawee of a bill by his acceptance of it?
2. D draws a bill on A, payable to the order of P. H presents it to A and A accepts it. In an action by H on the bill, A defends on the following

grounds: (*a*) that A is a fictitious payee; (*b*) that P is an infant and has no capacity to indorse; (*c*) that D's signature is a forgery; (*d*) that D had no authority to draw on him. What decision?

3. D draws a bill on A to the order of P. P loses the instrument. T finds it and forges an indorsement to Q. Q presents it to A who accepts it. H sues A on the bill. A contends that H cannot recover because he claims through a forgery. H replies that A by his acceptance admits the genuineness of P's signature. What decision?
4. Price in this case paid the other bill drawn on him, in ignorance of the forgery of D's signature, without having previously accepted it. Why did the court refuse to permit Price to recover this money as money paid away under a mistake of fact?
5. If Price had been permitted to recover the money from Neal, what would have been Neal's recourse? Under the hypothesis that Price could recover, where would the loss have been placed ultimately? On whom should the loss ultimately fall?
6. What provisions are found in the N.I.L. relating to the two situations passed on by the court in the principal case?

HOUGH *v.* STATE BANK OF NEW SMYRNA

61 Florida Reports 290 (1911)

Whitfield, C. J. S. V. Hough executed notes payable to J. E. Dean, Sr. The notes were subsequently indorsed in blank by J. E. Dean, Sr., and G. W. Dean, and the bank as holder brought a joint action against S. V. Hough, the maker, J. E. Dean, Sr., the payee and indorser, and G. W. Dean, indorser for non-payment of the notes.

G. W. Dean demurred to the declaration on the ground that he was improperly joined in a joint action on the notes. The demurrer was overruled and judgment was finally entered for the plaintiff against all three defendants for the amount due on the notes. A writ of error was taken in the name of all the defendants and it is contended that reversible error was committed in overruling the demurrer to the declaration.

The Negotiable Instruments Statute provides that "a person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor is deemed to be an indorser, unless he indicates by appropriate words his intention to be bound in some other capacity. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser." Sections 2996, 2997, *General Statutes of 1906*.

Whatever effect this statute has upon the rule announced in *Melton* v. *Brown*, 25 Fla. 461, 6 South. Rep. 211; *McCullum* v. *Driggs*, 35 Fla. 277, 17 South. Rep. 407; and *Camp* v. *First Nat. Bank of Ocala*, 44 Fla. 497, 33 South. Rep. 241, that where a person not a party to a negotiable instrument places his name upon the back of the instrument before its delivery to the payee, for the purpose of lending credit to the instrument, and there was no understanding that the liability was not to attach until after the indorsement by the payee, the liability of such person is that of a maker, *Baumeister* v. *Kuntz*, 53 Fla. 340, 42 South. Rep. 886, the statute and the cited decisions do not make one who merely indorses a note in blank, after its delivery to the payee, liable as a maker so as to authorize a joint action against the maker and the indorsers.

Under the Negotiable Instruments Statute the maker of a negotiable instrument engages that he will pay it according to its tenor. An indorser without qualification engages that on due presentment the note shall be paid, and that, if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount. Sections 2993, 2999, *General Statutes of 1906*.

The obligations of a maker and of a mere indorser of a negotiable instrument are under the law essentially different, that of the maker being absolute while that of an indorser is contingent. The liability of a maker and of an indorser of a negotiable note is not in nature or substance joint or similar.

It is a well settled rule, that in an action *ex contractu* against several defendants, the plaintiff must show a joint liability in all. A joint action against the maker and indorser of a promissory note cannot be maintained, in the absence of a statute authorizing it, since there is no joint liability, the obligation of each being several and the liability of each being dependent upon substantially different conditions and contingencies. *Webster* v. *Barnett*, 17 Fla. 272.

The declaration alleges that Hough made and delivered the notes to J. E. Dean, Sr., as payee, and that subsequently, but before delivery to the plaintiff bank, J. E. Dean, Sr., the payee, and G. W. Dean, "by writing their names on the back of said notes, thereby then and there became and made themselves original promisors and makers of the said notes."

Under the law and the facts alleged, the liability of G. W. Dean is that of an indorser, no contrary intent being shown. As the liability of a maker and of an indorser after delivery of a promissory

note depends upon different contingencies and is not joint, at least in the absence of a proper showing of a contrary intent, the demurrer of G. W. Dean addressed to the feature of the declaration alleging a joint liability should have been sustained.

The judgment is reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Compare this case with *Moore* v. *Cross*, *supra*, page 357. On what theory did the court reach its decision in *Moore* v. *Cross?*
3. What is the engagement of an indorser of a negotiable instrument? How does his undertaking differ from that of the maker of a note? How does it differ from the undertaking of an acceptor of a bill of exchange?
4. What is the difference between the contract of one who transfers an instrument by indorsement and the contract of one who transfers an instrument by delivery?
5. P indorses M's note to Q, Q to R, and R to H. H presents the note for payment at maturity and payment is refused. H notifies only P of the dishonor. What are the rights of H on the instrument?
6. In the foregoing case, H sues P who contends that H should have sued R before suing him. What decision?
7. P is holder of a note payable to his order. P indorses it to Q, Q indorses to R, R indorses to H, and H indorses it back to P. P presents the instrument to M who dishonors it. P gives proper notice of dishonor to H and brings an action against him on the note. What decision?

DUMONT *v.* WILLIAMSON

18 Ohio State Reports 516 (1869)

The defendant indorsed a note "without recourse" to the plaintiff. The note was payable to one Wolff, or order, and purported to be indorsed by him; but, as a matter of fact, the indorsement was a forgery. This is an action against defendant on an alleged warranty. The defendant demurred and the demurrer was sustained.

Scott, J. The plaintiff here asks a reversal of his judgment on the ground of error in the superior court in sustaining the demurrer to his petition.

There is no statement in the petition of the circumstances under which the note in this case was transferred to the plaintiff, or the consideration paid therefor, but it is to be presumed that it was so

transferred for a valuable consideration. If the fact be otherwise, this is a matter of defense, to be set up by answer.

There is no averment of fraud, or that the defendant had knowledge, at the time of the transfer, of any defect in the note which he concealed. The question therefore arises, whether, upon the sale and transfer of a promissory note by indorsement "without recourse," the vendor impliedly warrants that the signatures of the prior parties whose names appear thereon are genuine.

Whilst the words "without recourse" accompanying an indorsement clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity, upon due demand, or even if all the parties to the paper should prove to be wholly insolvent, we think they cannot be construed as importing more than this. At least they do not divest such indorser of his character as a vendor of the note, nor exempt him from the liabilities arising from a sale and transfer by delivery, where the note is capable of being thus transferred. In such a case, then, is there no implied warranty on the part of the vendor that the note is not forged? That it is in fact what it purports on its face to be?

The law is stated in 2 Parsons on *Notes and Bills*, 37, 39, where it is said to be "well settled that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be." In a note on page 38, the case of *Baxter* v. *Duren*, 29 Maine, 434, is referred to, where it was held that one who sells and transfers a promissory note by delivery is not liable on an implied warranty of its genuineness, if he sold the same as property, and not in payment of a debt previously existing or then created, and if he did not know of the forgery. But it was said in that case that if the note was transferred by delivery merely, in payment of a debt due, or for goods then purchased, or by way of discount for money then loaned, there would in such case be an implied warranty of the genuineness of the paper. "But," adds the learned author, "this distinction does not seem to be well founded." And again, at page 589 of the same volume, the principle is broadly stated "that any transferrer of a note or bill transferable by delivery, warrants that it is no forgery. If it turns out that the name of one of the parties is forged, and the bill becomes valueless, the vendor, though no party to the bill, becomes liable to the vendee as upon a failure of consideration." He then proceeds to state, without further comment, the distinction which

was taken in the case of *Baxter* v. *Duren*, *supra*, and of which he had previously disapproved.

In the sale of what purports to be a promissory note, it is not the material substance of the paper and ink for which the consideration is understood by the parties to be paid, but it is the chose in action of which the note purports to be the evidence that is the real subject of negotiation and transfer. But if the note is forged, if no such chose in action exists, if the vendor neither owns nor parts with anything of the kind, it is difficult to see any just ground upon which he can be allowed to retain the purchase money. He has undertaken to sell what he did not own, and that which in fact has no existence. The maxim of *caveat emptor* is inapplicable to such a case.

The present case, however, is much stronger. It is not a case of sale by delivery merely, but by indorsement, qualified, it is true, so as to exclude the liabilities consequent thereon under the commercial law. Still, the defendant is a party to the note, he has sold and transferred it as such, and he is bound to make his representations good. On this question we know of no conflict in the authorities.

The judgment of the court below must be reversed, the demurrer to the plaintiff's petition overruled, and a *procedendo* awarded.

QUESTIONS

1. What was the nature of the indorsement made by the defendant in this case? Is such an indorsement evidence to subsequent holders that there are defects and infirmities in the title to the instrument? What is the legal effect of such an indorsement?
2. P indorses a note *sans recourse* to H. H presents it to M for payment and payment is refused. He notifies P of the dishonor of the instrument and brings an action against him on the note. What decision?
3. When H presents the note in the foregoing case he finds that M is hopelessly insolvent. What decision in an action by H against P on the instrument?
4. P indorses a note of M to Q. Q indorses it to H without recourse. M refuses to pay the note. H notifies P of the dishonor of the instrument and demands payment of him. P disclaims liability on the instrument because of his infancy. What are H's rights, if any, against Q?
5. M, an illiterate person, is induced by P to sign a note under the belief that he is signing a contract of agency. P indorses the instrument *sans recourse* to H. M refuses to pay the note at maturity because of the fraud practiced on him. What are the rights of H, if any, against P?

6. P indorses a note to Q in blank. Q transfers it to R by delivery. R transfers it to H in the same manner. H discovers that M's signature is a forgery. What are his rights against M? against P? against Q? against R?
7. What are the various warranties of an indorser without recourse? Who can take advantage of such warranties—his immediate indorsee or any subsequent indorsee?
8. What are the warranties of a person who transfers a bearer instrument by delivery? Who can take advantage of such warranties—his immediate indorsee or any subsequent indorsee?

ERWIN *v.* DOWNS

15 New York Reports 575 (1857)

Appeal from the Supreme Court. The defendant was sued as the indorser of two promissory notes, signed Waller & Burr, for the payment of $150 each, to the order of the defendant. The action was tried before a referee, who found, as facts, that Waller & Burr were two married women, viz., Rachel M. Waller and Henrietta Burr, doing business as a mercantile firm in the city of New York. That the promissory notes were signed by said Henrietta Burr, in the name of Waller & Burr, and were indorsed by the defendant, for the benefit and accommodation of Waller & Burr, and for the business carried on by them; that said notes were transferred to the plaintiff before maturity, for a full and valuable consideration, but with the knowledge that the names of Waller & Burr, signed to the notes, were those of two married women. He further found that, when the notes became payable, the presentation was made at the place of business of the said firm of Waller & Burr, to Mrs. Burr, and payment thereof refused, but in the absence of Mrs. Waller, and notice of non-payment was duly served on the defendant. The referee reported that the plaintiff was entitled to judgment, and the Supreme Court, at General Term in the First District, affirmed the judgment rendered on his report. The defendant then appealed to this court.

Shankland, J. The note was void, as against the makers, because they were married women, and incapable of contracting obligations in that form. But when the defendant indorsed the note, he impliedly contracted that the makers were competent to contract and had legally contracted the obligation of joint makers of the note. He also assumed the legal obligation, in most respects, of the drawers of the bill. The fact, known to the plaintiff at the time he took the note, that the makers were married women did not deprive him of

the character of a bona fide purchaser. Nor does the payee's knowledge that the drawee is a married woman discharge the drawer in case of non-payment of the bill by the drawee. Nor is the indorser discharged, though the name of the maker is forged. (1 Comst. 113.)

The fact is not found that the plaintiff was aware the note was accommodation paper. The plaintiff was a bona fide purchaser within the law merchant. Neither the complaint nor the finding of the referee tell us who transferred the notes to the plaintiff. The legal presumption is that he received them from some legal holder in due course of business.

The judgment should be affirmed.

QUESTIONS

1. Does it appear in this case what form of indorsement the defendant made?
2. Suppose that the defendant in this case had indorsed the instrument without recourse, would he have escaped liability to the holder?
3. In this case it appears that the plaintiff knew, when he took the instrument in question, that the makers were married women. How could they be bona fide holders under the circumstances?
4. Would the right of the plaintiff to recover on the instrument have been affected in case he had known that the instrument was an accommodation paper?
5. What are the undertakings of a general indorser of a negotiable instrument? How does his liability on an instrument differ from the liability of an indorser without recourse?
6. Is a drawer of a bill primarily or secondarily liable on it? Precisely what is the liability of a drawer of a bill?

START *v.* TUPPER

81 Vermont Reports 19 (1908)

MUNSON, J. On August 22, 1906, the defendant, the payee of the check in suit, delivered it to the plaintiff, duly indorsed, in payment of a pre-existing indebtedness of less amount, and received the difference in cash. The check was dated August 20, and was drawn on a bank in Melrose, Massachusetts. The plaintiff held it six days before forwarding it for collection. It was presented and protested for want of funds September 4. August 24 was the last day on which payment would have been made. The case states that the defendant is sued as indorser.

Most of the facts, including those recited above, were shown by an agreed statement. The evidence before the jury was with reference to what "the usual commercial way now in use" required of the bank through which the check was forwarded, and when the check would have been presented for payment if it had been received by the collecting bank on the twenty-third of August, and been forwarded in the way required. Several exceptions were taken to the admission and rejection of testimony. The defendant rested without offering evidence and moved for a verdict; and his motion was overruled on the ground that the defendant was not damaged by the plaintiff's neglect, inasmuch as the check would not have been paid if forwarded in due course. The plaintiff then moved for a verdict on the ground indicated, and a verdict was ordered accordingly, to which the defendant excepted.

It is not necessary to consider the exceptions relating to the evidence. The agreed statement shows a failure to forward in due course, and this is decisive of the case presented. The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer, are not applicable to an indorser. The drawer is presumed to know the insufficiency of the fund, while the indorser is entitled to rely on its sufficiency. The drawer is the one primarily liable, and prompt presentment and notice of non-payment may enable the indorser to secure himself. The indorser's liability is impliedly conditioned on this being done, and a failure therein will discharge him, even though presentment in due course would have been unavailing. In default of presentment and notice, an indorser can be charged only by affirmative proof that he knew when he passed the check that there were or would be no funds in the bank to meet it. Daniel, *Negotiable Instruments*, sections 1587, 1596, 1646; *Humphries* v. *Bicknell*, Litt. 297; *Carroll* v. *Sweet*, 128 N.Y. 19; see *Nash* v. *Harrington*, 2 Aik. 9.

Judgment reversed and cause remanded.

QUESTIONS

1. Why should the defendant as indorser be discharged in this case when it appears that even if the check had been presented for payment diligently it would not have been paid?
2. Suppose that the plaintiff had been suing the drawer of the check under the circumstances stated in the principal case, what would have been the decision of the court?

3. Would a different result have been reached in this case, if it had appeared that the defendant knew, when he sold the check to the plaintiff, that the drawer had no money in the bank?
4. D draws a check on the A bank to the order of P in the sum of $50 in payment of a debt which he owes to P. When, two weeks later, P presented the check for payment, he found that the A Bank had been insolvent for three days. P sues D on the original debt for $50. What decision?
5. H is suing P as indorser of a bill. He alleges and proves that the bill was accidentally destroyed and offers a bond to indemnify P against loss. What decision?

WALKER *v.* ROGERS

40 Illinois Reports 278 (1866)

This was an action of assumpsit commenced in the court below by Jefferson T. Rogers and Robert R. Jefferson, as indorsees against Martin O. Walker and James Moore, as drawers of two certain bills of exchange. Pending the suit Jefferson and Moore died, and the cause proceeded in the names of the survivors, a trial resulting in a verdict and judgment for the plaintiff. The defendant thereupon sued out this writ of error. The nature of the case is fully developed in the opinion of the court.

Lawrence, J. This was an action brought by the indorsee of two bills of exchange against the drawers, the acceptor having failed to pay. There is no proof of presentment for payment to the acceptor, at the maturity of the bills, nor of immediate notice of non-payment. It is insisted, however, by the defendant in error, that the drawers were not discharged by this laches of the holder because, it is said, they had no funds in the hands of the acceptor. It appears, however, that the acceptor was indebted to the drawers, and this fact made it obligatory on the holder to present the bill at maturity. Such indebtedness was a fund against which the plaintiff in error had a right to draw. *Thackery* v. *Blackett*, 3 Campb. 164.

It is also insisted that the drawers waived the laches by a subsequent promise. The language used was equivocal, but, admitting that the partner who used it intended to be understood as promising payment, there is no evidence that, when he made the alleged promise, he knew that the holder had failed to present the bill at maturity or to give due notice of non-payment. Unless it appears that the new promise was made with a full knowledge of the facts out of

which the discharge of the drawer has arisen, such promise is no waiver. The burden of making this proof is upon the plaintiff. *Morgan* v. *Peet*, 32 Ill. 288; *Farrington* v. *Brown*, 7 N.H. 271; *Trimble* v. *Thorn*, 16 Johns. 153.

It is impossible to sustain this verdict upon the evidence.

Judgment reversed.

QUESTIONS

1. H is the holder of a bill drawn by D on A. He failed to present it to A for payment at maturity. Several days later, D, being informed of the failure to present the bill for payment, promised to pay it. H sues D on the bill. What decision?
2. Action by H against D on a bill. D contends that he is not liable because H never presented the bill to A for payment. H replies that A was under no obligation to accept bills for D. What decision?
3. D draws a bill on A to the order of P, having no reason to believe that A will accept it. H sues D on the instrument. D defends on the ground that H never presented the bill to A for payment. What decision?
4. M makes a note for the accommodation of P. P indorses it to H, hoping, but not certain, that M will pay it. H sues P on the note. P pleads by way of defense that the note was never presented to M for payment. What decision?

HART *v.* SMITH

15 Alabama Reports 807 (1849)

DARGAN, J. This was an action of assumpsit on a bill of exchange drawn by the defendant, in favor of the plaintiff, on Desha & Smith, dated February 26, 1846, payable at sight. The only evidence introduced to charge the drawer was the bill and protest, showing a demand of payment made of the drawees, of March 4, 1846, and notice to the drawer. The court charged the jury that the plaintiff could not recover.

A bill payable on demand, or at any fixed time, need not be presented for acceptance, but a demand of payment, at the time the holder has the legal right to demand payment, is all that is necessary. And if the bill be not paid the holder may protest it for non-payment, and on his giving due notice to the drawer and indorsers, their liability is fixed. *Evans* v. *Bridges*, 4 Porter, 345; 1 Peters, 25; 2 *ibid.* 170; Chitty on *Bills*, 10th ed., 272. But when the time of payment is uncertain and a presentation of the bill is necessary in order to ascertain and fix the time of payment, as if the bill be payable at a

number of days after sight, then the bill must be presented for acceptance before payment is demanded. Story on *Bills*, Section 112, 227; Chitty on *Bills*, 10th ed., 272; Bayley on *Bills*, 5th ed., 217, 218.

It is contended that a bill payable at sight is entitled to days of grace, and therefore it must be presented for acceptance before payment can be demanded. I am free to confess that my opinion, untrammeled by authority, would incline me to hold that a bill of exchange, *payable at sight*, is not entitled to days of grace, and that payment may be demanded on presenting the bill; which, if refused, would authorize the holder forthwith to have it protested for non-payment, and, on giving notice to the drawer, to hold him liable. But the law seems to be settled otherwise. JUDGE STORY, in his treatise on *Bills*, says, "that days of grace are allowed on all bills, whether payable at a certain time after date, after sight, or even at sight. And although there has been some diversity of opinion, whether bills payable at sight are entitled to days of grace, it is now settled by the decisions, both in England and America, that days of grace are allowable on such bills." Section 342, page 429. To the same effect, see Chitty on *Bills*, 10th ed., 376; Bayley on *Bills*, 5th ed., 244, 245; Selwyn's *N.P.*, 9th ed., 351; *Coleman* v. *Sayre*, 1 Barnard, 303; *Dehers* v. *Harriot*, 1 Show. 165; Stephens's *N.P.*, 876. Under the influence of these authorities, I feel constrained to hold that a bill payable at sight is entitled to days of grace; consequently, a demand of payment made of the drawer, upon the first presentation of the bill to him, is insufficient to charge the drawer, for the bill is not then due. As there was no evidence of any previous presentation of the bill for acceptance nor notice given of non-acceptance, the demand of payment was prematurely made and was therefore a nullity.

As the evidence fails to show a demand of payment on the day the bill was payable, the court correctly instructed the jury that the plaintiff could not recover.

Let the judgment be affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Would the court have reached the same decision under the N.I.L.?
3. What would have been the decision of the court if the plaintiff had been suing the drawee of this bill?

4. Under what circumstances must a bill of exchange be presented for acceptance? Why should presentment for acceptance ever be necessary?
5. When presentment for acceptance is necessary, how must it be made? When must it be made? On whom must it be made?
6. Under what circumstances, if any, will a holder of a bill of exchange be excused from presenting a bill for acceptance in cases where presentment for acceptance is necessary?
7. H is suing D on a bill of exchange. H proves a presentment for acceptance and a refusal by A to accept. D contends, however, that a presentment for payment at maturity should also have been made. What decision?

COLUMBIA BANKING COMPANY *v.* BOWEN

134 Wisconsin Reports 218 (1908)

June 10, 1903, the banking firm known as the Farmers' and Merchants' Bank, of Bangor, Wisconsin, sold the defendant a $400 draft, drawn in the usual form, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America at Chicago, Illinois. The draft was sent to the defendant at Barron, Wisconsin, and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail at Spokane, Washington, June 16, 1903, and was there received by him June 20 thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, California. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving $400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Illinois, by which it was received July 18 thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for non-payment by a duly authorized notary public, who forwarded a manifest thereof with notices of protest for A. R. Tabbert, the plaintiff and the defendant, to the plaintiff at San Francisco, California, and also sent due notice to the National Bank of North America at Chicago, Illinois, and to the drawer at Bangor, Wisconsin, July 19, 1903. Plaintiff upon receipt of the manifest and notices duly sent the one for the defendant to him at Barron, Wisconsin, by whom it was duly received, and sent the one for Tabbert by mail to his post-office address and reputed place of residence, that being San Francisco, California. Thereafter due demand was made on defendant for payment of the draft and the same was refused. July 28, 1903, the property of the

drawer was placed in possession of a receiver, who duly paid on the draft $144.49 January 6, 1904, $61.93 May 20 thereafter, and $30.96 June 5 following. Plaintiff was the owner of the draft at the time of the commencement of the action, and at the time of the trial thereof there was due thereon $210.

The pleadings presented issues for decision involving facts as detailed above. The case was tried by the court, resulting in findings of fact in accordance with the statement and a conclusion of law that plaintiff became owner of the draft in due course and was entitled to judgment for $210, with costs. Judgment was rendered thereon.

MARSHALL, J. The primary question discussed by appellant's counsel, it is believed, is fully covered by the Negotiable Instruments Law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business transactions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent and some real conflicts, to remedy which was one of the principal objects of the law.

To that end it was provided in section 1680, "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer," and it was further provided in section 1684, "A check is a bill of exchange drawn on a bank, payable on demand."

As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The only exception referred to, material to this case, is contained in section 1684 in these words: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Keeping in mind that the discharge from liability referred to above because of unreasonable delay after the issuance of a check in presenting it for payment is of the drawer only, and that this action is against

the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 1678, which provides as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing it, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand regardless of its character, put in circulation, so long as its circulating character is preserved, may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. This is recognized as a radical change in the law as it formerly existed.

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18 of one year and January 16 of the next year was not necessarily unreasonable. *Gowan* v. *Jackson*, 20 Johns. 176. Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

Applying the law as aforesaid to the facts of this case, it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

Judgment affirmed.

QUESTIONS

1. Would the court have reached the same conclusion on the facts of the principal case under the common law?
2. Is there any justification for the provision of the N.I.L. which was applied by the court in this case?
3. D draws a bill on A to the order of P on demand. P holds the bill for a week and indorses it to Q. Q holds it for a year and indorses it to H. H, on the day he receives it, presents it to A for payment. A refuses to pay it. H seasonably notifies D and P of the dishonor of the instrument. What are his rights on the instrument against D? against P? against Q?
4. Is presentment of an instrument for payment necessary to charge a person primarily liable on it? Why or why not?
5. Is presentment for payment necessary to fix the liability of a person secondarily liable? Why or why not?
6. H is the holder of an instrument not payable on demand. When must he present it for payment? Is the debtor entitled to days of grace at common law? under the N.I.L.?
7. H is the holder of an instrument, falling due on January 30. At what hour of this day may he present the instrument for payment? May he present it for payment at 3 A.M.? at 11 P.M.?
8. The instrument in the foregoing case is payable at the A Bank. At what hour during the day may he present it for payment?
9. H is the holder of an instrument which falls due on Sunday. When must he present it for payment?

GORDON *v.* LEVINE

194 Massachusetts Reports 418 (1907)

MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated December 30, 1905, which was Saturday, though there was some question whether it was actually drawn and delivered on that day or December 31. The plaintiff is described in the writ as of Chelsea, and the defendant as of Boston. The bank on which the check was drawn was in Boston, and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it, but that he presented it Monday morning, January 1, and was told there were no funds, and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in

payment of a bill which he owed him, receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein, who deposited it on January 4, in the Faneuil Hall National Bank in Boston for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5, to the bank on which it was drawn, the Provident Securities and Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant that the bank had failed, and that the defendant promised to make the check good. The defendant denied this and also the plaintiff's statement that he had asked the plaintiff not to present the check for a couple of days, and introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have down to the failure of the bank. It was admitted that the bank failed on Friday, January 5, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain instructions that were requested, and to the admission of certain testimony.

The defendant, in substance, asked the judge to instruct the jury that a check must be presented for payment in a reasonable time, and that, in order to have been presented within a reasonable time, the check in suit should have been presented before the close of banking hours on Monday, that its transfer to successive holders would not extend the time for presentment, and a presentment on January 5 would not be within a reasonable time, and if the bank had failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent. The judge gave in part the instruction thus requested, and refused it in part. He instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday that would be within a reasonable time. But he refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. On the contrary he instructed them that "the court had occasion to consider that in one case in this Commonwealth (referring, we assume, to *Taylor* v. *Wilson*, 11 Met. 44), and it is there stated that a check may also be passed

from hand to hand, and a reasonable time is allowed to each party receiving the same to present it for payment." And after calling their attention to provision of the statute (*R.L.* chap. 73, sec. 209) that in considering what a reasonable time is "regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case," left it to them to determine whether the check was presented on Monday, or, if they were not satisfied that it was, then, to determine whether if it passed from hand to hand and each one had a reasonable time to present it, the presentment on Friday was within a reasonable time. For aught that appears the jury may not have been satisfied that the check was presented on Monday and may have found for the plaintiff on the ground that the presentment on Friday was within a reasonable time. The question is therefore distinctly raised whether a presentment on Friday could have been found to be within a reasonable time.

The general rule is as was stated by the judge and as is provided in the Negotiable Instruments Act (*R.L.* chap. 73, sec. 203) that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented, and the drawer sustains a loss by reason of the failure of the drawee, he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument which though defined in the Negotiable Instruments Act (*R.L.* chap. 73, sec. 202) as "a bill of exchange drawn on a bank payable on demand" is intended for immediate use (*Mussey* v. *Eagle Bank*, 9 Met. 306, 314), and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss, if any, resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The Negotiable Instruments Act provides generally (*R.L.* chap. 73, sec. 209), as the judge said, that "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instrument and the facts of the particular case." This, however, would not seem to lay down or establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had

to the rules which have been hitherto established in similar cases. And one of the rules which has been established is that, where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterward the drawer suffers no harm. But if not presented within the time thus fixed and there is a loss, it falls not on him but on the holder. *Watt* v. *Gans*, 114 Ala. 264; *Simpson* v. *Pacific Ins. Co.*, 44 Cal. 139; *Bickford* v. *First National Bank of Chicago*, 42 Ill. 238, 244; *Northwestern Coal Co.* v. *Bowman*, 69 Iowa, 150; *Kirkpatrick* v. *Puryear*, 93 Tenn. 409; Bigelow, *Bills and Notes*, 78.

QUESTIONS

1. What instructions were given by the court below to the jury? In what respect were these instructions erroneous?
2. Would the decision in this case have been the same if the instrument in controversy had been a bill of exchange?
3. Would the decision have been the same, if the action had been by an indorsee against an indorser?
4. D draws a check on the A Bank to the order of P and delivers it to P on Monday. P indorses it to H. H presents it to the A Bank for payment on Friday and is informed that D has no funds on deposit. H sues D on the check. D contends that he is discharged because the check was not presented for payment within a reasonable time after its issue. What decision?
5. What was the decision of the court in *Start* v. *Tupper*, *supra*, page 428?

GILPEN *v.* SAVAGE

201 New York Reports 167 (1911)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department entered May 28, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court at a trial term without a jury.

Cullen, C. J. The action is brought against the indorser of a promissory note made payable at a particular place designated by street and number, which was the residence of the maker. The only question in the case is whether the presentment to the maker was

sufficient to charge the indorser. At the maturity of the note it was in the hands of the Columbia National Bank, which was located about two miles from the maker's residence, in Buffalo. After some delay the cashier of the bank succeeded in calling up the maker at his place of residence. He stated to him that the bank held the note, and the further conversation between the parties we will assume to be sufficient to establish a demand for its payment and refusal or statement of inability on the part of the maker to comply with the demand. The cashier had the note in his possession when the demand was made, and the maker made no request to see it or for its production, but stated he would call at the bank, which he did a short time subsequently; what then transpired between the parties does not appear. By section 116 of the Negotiable Instruments Law an indorser engages that on due presentment a note or bill will be paid, and that if it be dishonored and if the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder. By section 130 presentment for payment is necessary in order to charge the indorser. By section 132 presentment to be sufficient must be made at a proper place as defined in the act, and by section 133 presentment is made at a proper place where a place of payment is specified in the instrument and it is there presented. These statutory provisions seem to be a mere re-enactment of the common law as it has hitherto obtained in this state, with the possible exception that they may have altered the rule that, where no possible damage could occur to the indorser by the failure to make proper presentment, he was not discharged by such failure, which exception, however, was of the most limited character, mere insolvency of a party primarily liable on the instrument not being sufficient to create it. (*Smith* v. *Miller*, 52 N.Y. 545.)

It seems to us entirely clear that no proper presentment of the note was made. Presentment of a note and demand of payment must be made by actual exhibition of the instrument itself, or at least the demand should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case. (Daniel on *Negotiable Instruments*, sec. 654.) While it may not be necessary to actually produce the note if the maker refuses to pay it, it must be there at the place for presentment, otherwise the presentment is insufficient. (Story on *Promissory Notes*, section 243; *Freeman* v. *Boynton*, 7 Mass. 483; *Woodbridge* v. *Brig-*

ham, 13 Mass. 556.) The reasoning of CHIEF JUDGE RUGER in the case of *Parker* v. *Stroud* (98 N.Y. 379) clearly points out the reason for the rule. The action was against the indorser of a demand note who pleaded the statute of limitations, relying upon a demand for payment made on the maker by mail. It was held the demand was insufficient to set the statute running. It was said:

> A demand of payment, at the place named, is an essential part of the contract so far as the endorser is concerned, and no right of action accrues to the holder until "after demand has been made in strict compliance with the terms of the contract and due notice given to the default." It is essential to the validity of a demand, that it shall be made by a person authorized to receive payment and deliver the instrument upon which it is founded, and the person upon whom it is made, must then be afforded an opportunity, by immediate payment or performance, to protect himself from the consequences of a breach of contract [p. 384].

So necessary is it that the demand be made at the place specified in the instrument in order that the indorser may be charged, that the addition to a promissory note payable generally of words specifying a particular place of payment is held to be a material alteration of a contract which of itself discharges the indorser. (*Woodworth* v. *President, etc., Bank of America*, 19 Johns. 391.)

The counsel for the respondent seeks to sustain the judgment below on two propositions: first, that a demand over the telephone on the maker, at the place specified in the note, is the same as a demand at that place by ordinary speech; second, that the possession of the note by the cashier was sufficient to make the demand a proper one. The truth of the first proposition as a general rule may be conceded; but the argument ignores the fact that a valid presentment, as hitherto pointed out, consists of something more than mere demand. It requires personal attendance at the place of demand with the note, in readiness to exhibit it if required and to receive payment and surrender it if the debtor is willing to pay. The counsel cites several cases in which it is said that the possession of the instrument by the person making the demand is sufficient although it is not actually exhibited. These statements were entirely accurate when made before the general use of the telephone. When demand is made by ordinary human vocal power, unaided by mechanical device, it is plain that the person making the demand is necessarily present at the place at which the demand is made, and if the instrument is in

his possession the presence of the instrument is equally clear. The statement if now inaccurate is so by the use of the telephone. If the theory on which the decisions of the courts below have proceeded is to prevail, it is difficult to see why a valid presentment of a note payable in Buffalo might not be made over the telephone from New York, or if that is to be deemed too great a distance, where shall the line between a sufficient and insufficient demand and presentment be drawn? Will a demand for payment of an instrument payable in Buffalo be good if made at Batavia and bad if made at Rochester?

The judgment appealed from should be reversed and new trial ordered, costs to abide the event.

QUESTIONS

1. Was there not a demand on the maker for the payment of the note in controversy in the principal case? If so, why should the indorser be discharged from his liability on it?
2. H holds M's note payable to the order of P. H asks M if he will pay it. M replies that he will not. H sues M on the note. M contends that he is discharged because H did not have the note in his possession when he made the demand. What decision?
3. H is suing P, an indorser of the note, in the foregoing case. P contends that he is discharged because a proper demand was not made on M. What decision?
4. H is the holder of a note made by M. No place of payment is specified in the note but M's address is given. Where should the instrument be presented for payment?
5. In the foregoing case, no place of payment is specified and M's address is not given. Where should the instrument be presented for payment?
6. H is the holder of a note made by M and indorsed by P, payable at the A bank. H presents the note at the A Bank at maturity and finds the A Bank closed and in the hands of a receiver. H notifies P of the dishonor of the instrument and brings action on it against him. What decision?
7. H is the holder of a note made by M to the order of P. X, a clerk of A, acting without authority, presents the note to M for payment. M refuses to honor the note. X notifies P of the failure of M to pay the instrument. H sues P as indorser. What decision?
8. H delivers to X a note and authorizes him to collect it from M. M refuses to pay it because X does not possess written authority to receive payment. H notifies P, his indorser, that M has dishonored the instrument and brings action on it against H. What decision?
9. Under what circumstances will delay in making presentment for payment be excused?

10. Under what circumstances will presentment for payment be dispensed with?
11. What constitutes dishonor of an instrument? What is the legal effect of the dishonor of an instrument? When an instrument has been dishonored, what is the next step which the holder must take in order to change parties of secondary liability?

CHEEK *v.* ROPER

5 Espinasse Reports 175 (1804)

Assumpsit on a bill of exchange against defendant as drawer.

The declaration stated in the usual form that the defendant drew his bill of exchange for £60 on one J. Hammond, tanner, in Bristol, which was duly shown and presented to the said Hammond for his acceptance, etc., who refused to accept or pay the same, by reason whereof the defendant became liable.

To prove the fact of the bill having been presented to Hammond for his acceptance, the plaintiff proved that the bill was sent by the witness, who was called, who carried it to the place which was described to him as Hammond's house: he offered it to some person in a tan-yard, who refused to accept it; but he did not know Hammond's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so.

Lord Ellenborough said that the allegation respecting the bill was a material one, as the drawer could only become liable on the acceptor's default, which default must be proved. That the evidence here offered proved no demand on Hammond and was therefore insufficient, so that the plaintiff could not recover on the bill. Some evidence must be given of an application to the party first liable.

QUESTIONS

1. Why was there not a sufficient presentment for payment in the principal case?
2. H is holder of a note made by M in which no place of payment is specified. He presents it at M's home, and M's wife tells him that the note will not be paid. H sues P on the instrument. P contends that a proper presentment for payment was not made. What decision?
3. M executes a note to the order of P, "payable at my store." P indorses the note to H. H presents the note at M's store and is informed by a clerk that the note will not be paid. H sues P on the instrument. P contends that a proper presentment for payment was not made. What decision?

4. A, B, and C, partners, accept a bill drawn on them by D to the order of P. No place of payment is designated. To whom should the bill be presented for payment?
5. Suppose that A, B, and C are not partners. To whom should the bill be presented for payment?
6. H is the holder of a note made by M to the order of P. Before the note matures, M dies. To whom should H present the instrument for payment in order to charge P as an indorser?
7. D draws a bill on the A Company, a corporation. To whom should H present the bill for payment in order to charge D as drawer of the instrument?

LAWSON *v.* THE FARMERS' BANK OF SALEM

1 Ohio State Reports 206 (1853)

BARTLEY, J. Did the court of common pleas err in charging the jury that, if the notice to the indorsers of the demand and non-payment of the bill was deposited in the post-office at Pittsburgh, at any time during the day after the day of dishonor, without regard to the time of the departure of the mail for that day, it would be sufficient notice; and moreover, that if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent by the next mail of the day next after the day following the day of dishonor of the bill.

This involves a very important question of the law merchant, and it is not a little surprising that there should remain any doubt or uncertainty, at this late day, upon a question of such vital importance to the interest of commercial countries respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment, that a question which enters so largely as does this into the everyday business transactions of different commercial states and countries, should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

The liability of the indorser is strictly conditional—dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The plaintiffs in error in this

case, being accommodation indorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill.

The law does not require the utmost diligence in the holder in giving notice to the dishonor of a note or bill. All that is requisite is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this state. But what amounts to due diligence or reasonable notice is, when the facts are ascertained, purely a question of law, settled "with a view to practical convenience and the usual course of business."

The question was at one time strenuously contested, whether due diligence did not require that where the parties reside in the same place, the notice of non-payment should be given on the day of the dishonor of the bill; and where the parties reside in different places, should be sent by the mail of that day, or the first possible or practicable mail after the default. *Tindal* v. *Brown*, 1 Term. R. 167; *Darbishire* v. *Parker*, 6 East, 3; Marius on *Bills*, 24. But the rule was established and is supported by great weight of authority, that where the parties reside in different places, and the post is the mode of conveyance adopted, although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, the holder being entitled to the whole of that day, being the day of the dishonor or knowledge of the dishonor, to prepare his notice; yet that the notice would be insufficient unless put into the post-office in time to go by the next mail after that day. And this is in conformity with the rule laid down by Mr. Chitty, in his learned treatise on bills of exchange in the following explicit language: "When the parties do not reside in the same place, and the notice is to be sent by general post, then the holder or party to give the notice must take care to forward notice by post of the next day after the dishonor, or after he receives notice of such dishonor, whether that post sets off from the place where he is early or late; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day." Chitty on *Bills*, 485. If two mails leave the same day on the route to the place of the residence of the indorser it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted. *Whitewell* v. *Johnson*, 17 Mass. 449, 454; *Howard* v. *Ives*, 1 Hill (N.Y.) 263.

And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight, or at a very early hour in the morning, and is sometimes made up and closed

the evening preceding, it has been adjudged that inasmuch as the holder is allowed till the day after the day of default to send off the notice, reasonable diligence would not require him to deposit the notice in the post-office at an unreasonably early hour, or before a reasonable time can be had for depositing the notice in the post-office after early business hours of that day.

The rule, as qualified and settled by the late authorities, and which I take to be the correct one, is, that where the parties reside in the same place or city, the notice may be given on the day of default; but if given at any time before the expiration of the day thereafter, it will be sufficient; and when the parties reside in different places or states the notice may be sent by the mail of the day of the default; but, if not, it must be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post.

Applying the rule, therefore, which we have adopted as the correct one to this case, it is incumbent on the plaintiff below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post-office in Pittsburgh in time to be sent by the mail of July 28. Ten minutes past nine o'clock in the morning was not an unreasonably early hour or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect, therefore, to send the notice by the mail of the next day after the day of the default, operated to discharge the plaintiffs in error as indorsers, unless from some other cause notice had been dispensed with or rendered unnecessary. And for the charge of the Court of Common Pleas, to the jury to the contrary, the judgment is reversed and the cause remanded for further proceedings.

QUESTIONS

1. When a negotiable instrument has been dishonored, why is notice of dishonor given? To what parties is notice of dishonor given? What is the effect of failure to give notice?
2. Notice of dishonor is not required to be given to the drawer of a bill in certain cases in order to fix his liability. What are these cases? Why is notice not necessary in these cases?
3. In certain cases notice is not required to be given to an indorser in order to fix his liability. What are these cases? Why is notice not necessary in these cases?

4. What rule does the principal case announce as to the time allowed for the giving of notice of dishonor when the parties to be notified live in different cities? Would the same decision have been made in this case under the N.I.L.?
5. Suppose that all of the parties to be notified had lived in the same place, what time would have been allowed for giving notice?
6. P, payee of a bill, indorses it to Q; Q indorses it to R; R to S; S to H. A refuses to pay the bill at maturity. On the day following, H notifies S of the dishonor; on the next day, S notifies R; on the next day, R notifies Q; on the next day, Q notifies P; on the next day, P notifies D. H brings an action against D, as drawer of the bill. D contends that he is discharged because he was not given seasonable notice of dishonor of the bill. What decision?
7. In the foregoing case, H waits four days before goving notice to D of the dishonor of the bill. He brings an action against D. D contends that he is discharged because he was not given proper notice. What decision?
8. P indorses a bill to Q. Q presents it to A for payment and payment is refused. Q gives due notice to D of the dishonor of the instrument and thereafter indorses the bill to H. (*a*) What are the rights of H on the bill against D? (*b*) Assuming that P, as indorser, has been compelled to pay the bill, what are his rights against D?
9. H is holder of a bill of exchange indorsed to him by P. He presents it to A for payment and payment is refused. P seasonably deposits a letter, properly addressed, containing a sufficient notice of dishonor, in the post-office. He brings an action on the bill against P as an indorser. P contends that he is discharged because the notice of dishonor failed to reach him. What decision?

STEWART *v.* KENNETT

2 Campbell's Reports 177 (1809)

Action against the defendant as indorser of a bill of exchange. The only question was whether the defendant had received due notice of the bill being dishonored for non-payment. To prove this, a witness of the name of Cutler was called, who swore that he had been employed by the original parties to the bill to get it discounted; that, when it became due, it was in the hands of one Abbott, to whom the plaintiff had indorsed it; that the day after, the witness met the defendant, and told him it had not been paid; that the defendant asked who held it, and that the witness answered, "It lies at Messrs. Bonds', Abbott's bankers." *Parke,* for the defendant, objected that

this was insufficient; that knowledge is not notice, and that the intimation of the dishonor of the bill must come from the holder of it. *Garrow*, contra, contended that the notice given by Cutler not only possessed the defendant of the same information, but placed him in the same situation as if it had come directly from the indorsee. What was there to hinder him from immediately taking up the bill and resorting to the acceptor, the drawer, or prior indorsers? Besides, Cutler, having been employed to get the bill discounted, might well be considered as an authorized agent to give the notice; and, even if he had no original authority to give the notice, the plaintiff adopted it by bringing this action.

LORD ELLENBOROUGH. If you could make Cutler the agent of the holder of the bill, the notice would be sufficient; but in reality he was a mere stranger. The bill when dishonored lay at the bankers of Abbott, with whom Cutler had no sort of connection. But the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise, it is merely an historical fact. In this case, Cutler was not possessed of the bill, and had no control over it. The defendant therefore is not proved to have had any legal notice of the dishonor of the bill, and is discharged from the liability he contracted by indorsing it.

Plaintiff nonsuited.

QUESTIONS

1. In this case, the defendant had actual knowledge that the instrument on which he was liable as indorser had not been paid at maturity. Why was this not held to be a sufficient notice of dishonor? Would the same decision have been reached in this case under the N.I.L.?
2. P is an indorser of a note which Q presents to M for payment at maturity. M dishonors the instrument. X, overhearing the refusal of M to pay, notifies P of the fact on the same day. Q sues P as indorser. P contends that he is discharged because he was not given sufficient notice of the dishonor of the instrument. What decision?
3. Who may give notice of dishonor of an instrument? May an agent give notice? Must he give it in his own name or in the name of his principal?
4. To whom should notice be given? May it be given to an agent of the party to be charged?
5. H is the holder of a note made by M. H knows that M died before the maturity of the note. What steps must he take in order to charge P as indorser?
6. P and Q, partners in business, indorsed a bill to H. A refused to pay the bill at maturity. H gave notice to P. In an action by H against

P and Q, Q contended that he was discharged because the partnership between him and P was dissolved before the instrument was dishonored. What decision?

7. What steps must H take in the foregoing case to charge both P and Q, in case they signed jointly but not as partners?
8. H presents a note to M and M refuses to pay it. What steps must H take in order to charge P, his indorser, who, between the execution of the note and its maturity, has been adjudged a bankrupt?

MELLERSH *v.* RIPPEN

7 Exchequer Reports 578 (1852)

Assumpsit by the plaintiff, the first indorsee of a bill of exchange for £64 10*s.* 11*d.*, payable three months after date, drawn by the defendant on J. Hunt. Plea, no notice of dishonor. At the trial before Martin, B., at the Middlesex sittings in the present term, in order to prove notice of dishonor, the plaintiff gave in evidence the following letter sent by him to the defendant: "I beg to inform you that your acceptance for £64 10*s.* 11*d.*, due today, drawn by Mr. J. Hunt, is not paid. Please have the goodness to hand me a cheque for the same, with noting expenses, 2*s.* 6*d.*, per return."

On the part of the defendant, it was objected that this notice was insufficient, as it misdescribed the parties to the bill. The learned judge directed a verdict to be entered for the plaintiff for the amount due, reserving leave to the defendant to move to set that verdict aside, and to enter a non-suit.

Lush now moved accordingly. It is submitted that the notice is insufficient, for it erroneously describes Hunt as the drawer, and the defendant as the acceptor of the bill. In *Beauchamp* v. *Cash*, the following notice—"I give you notice that a bill for, &c., drawn by you, lies at, &c., dishonored"—was held insufficient in an action against the defendant, who indorsed the bill, but did not draw it. In *Shelton* v. *Braithwaite*, which seems to be in the plantiff's favor, a letter was held to contain a sufficient notice of dishonor, although it showed neither the amount nor the date of the bill. There the court held that it lay upon the defendant to show that there was more than one bill to which the letter might apply, to render the notice uncertain. But here the letter misdescribes the bill of exchange. (PARKE, B. It would not be necessary for the plaintiff to show that any other bill existed to which this notice could apply.) But the plaintiff is bound to prove a good notice of dishonor.

Parke, B. This notice is quite sufficient. It is not possible, under the circumstances, that the defendant could have been misled by it. I therefore think there ought to be no rule.

Rule refused.

QUESTIONS

1. What test of the sufficiency of notice of dishonor does this case seem to announce?
2. Suppose that H sends a written notice. Must it be signed? How accurately must it describe the instrument in question?
3. Does the notice have to be in writing? What facts should be communicated by the notice? What is the effect of an insufficient notice?
4. D draws a bill and adds his address after his signature. In order to charge him as drawer, where must H send notice of dishonor? Suppose that D has not given his address, where must notice of dishonor be sent to charge him as drawer?
5. Under what circumstances, if under any, is delay in giving notice of dishonor excused?
6. Under what circumstances, if under any, is notice of dishonor dispensed with?
7. What is meant by "protesting" an instrument for non-payment or non-acceptance? In what cases is protest necessary? How is it made? By whom made? When made? What is its effect?

e) Discharge of Negotiable Contracts

LONG *v.* BANK OF CYNTHIANA

1 Littel's Kentucky Reports 290 (1822)

This was an action of debt, brought by the Bank of Cynthiana against Long and Robertson, upon a note for $3,000; executed by them to William Brown, and made negotiable and payable at the Bank of Cynthiana. The declaration alleges the making of the note by the defendants, the indorsement of it by Brown to Joel Frazier, the indorsement by Frazier to William Moore, the indorsement by Moore to the defendants, the indorsement by them to the bank, and that it was discounted by the bank, and not being paid when it became due, was regularly protested for non-payment. All these allegations are made in due form and apt words.

The defendants demurred to the declaration, and pleaded, first, *nil debet;* and secondly, that the note was not discounted by the bank. The circuit court overruled the demurrer, and the jury, on the trial

of the issues joined upon the pleas, found a verdict for the plaintiff, for "nine hundred dollars and thirty eight cents in damages"; for which the court rendered judgment. To that judgment the defendants prosecute this writ of error.

The Court: Several questions are made by the assignment. The point which was principally relied on in argument, and the only one we deem material to be noticed, arises out of the demurrer to the declaration. It is contended that the indorsement of the note, declared on, to the defendants, released them and extinguished the debt; and, therefore, it is inferred that the plaintiff had by their declaration shown no cause of action.

As it regards this point, it is immaterial, we apprehend, whether the note be considered as an ordinary note for the payment of money, or as possessing the character of a bill of exchange. The same principles must apply to it in both cases; and, in either case, the indorsement of the note to the defendants must operate as an extinguishment of their obligation to pay it; for by the indorsement to them, they became its proprietors, and they could not be bound to themselves. Nor could the obligation, thus extinguished, be resuscitated by the indorsement and delivery of the note by them to the bank; for, in general, when an obligation is once extinguished, it cannot be revived. A new obligation, of the same nature and extent, may indeed be created; but this could only be done in the same way in which the original obligation was created. Even an indorsement of the note to Brown, the original payee, would not, we apprehend, have revived the obligation, which had become extinct by the indorsement to the defendants. The indorsement, in that case, might, as the indorsement to the bank, in this case, no doubt did, create a new obligation upon the defendants; but it would be such an obligation as the law would imply from the nature of the transaction, and not such as the note upon its face imports.

The court, therefore, erred in not sustaining the demurrer to the declaration, and for that cause the judgment must be reversed.

QUESTIONS

1. Do you understand from the decision of the principal case that the plaintiff has no remedy against the defendants?
2. Suppose that the defendants had indorsed the instrument in question to Brown, the original payee, and that Brown had indorsed it to the plaintiff, would the decision in this case have been the same?

3. M executes a note to the order of P. P indorses it to Q, who indorses it to M. M, before maturity of the note, indorses it to H. What are the rights of H against P on the note?
4. P is the holder of a note executed by M. He indorses it to Q; Q indorses it to R; and R indorses it to H; H indorses it to P. P strikes out his own and all subsequent indorsements and indorses it to X. What are the rights of X against M on the instrument? against P?
5. D draws a bill on A to the order of P. P indorses the instrument to Q; Q indorses it to R; R indorses it to D; D indorses it to X. What are X's rights on the instrument?
6. A accepts a bill drawn by D for the accommodation of P, the payee. P indorses it to Q. Q presents the bill to P by whom it is paid. P strikes out Q's indorsement and indorses the instrument to X. What are the rights of X on the instrument?

SWOPE *v.* ROSS

40 Pennsylvania State Reports 186 (1861)

This is an action of assumpsit in the Common Pleas, entered in the February Term, 1860, between George Ross & Co., plaintiffs, and Swope & Karns, in which the following case was stated for the opinion of the court in the nature of a special verdict.

Ross Forward gave to Swope & Karns the following instrument of writing:

"Somerset, Pa., August 18, 1859.

"George Ross & Co., Bankers: Pay to Swope & Karns, or order, ninety days from date, six hundred and sixteen dollars.

"Ross Forward."

On or about the first of September thereafter, Swope, one of the firm of Swope and Karns, delivered this paper (indorsed Swope and Karns) to the plaintiffs' bank, had the same discounted, and received the money thereon, less the discount, $16.40. At the time this check was given, and when it was discounted at the bank, Ross Forward was one of the firm of George Ross & Co., but went out on September 19, 1859. When the day of payment named in the check came round, Forward had no funds in the bank, and the paper was regularly protested for non-payment on November 19, 1859.

If the court be of the opinion that on the foregoing state of facts, the plaintiffs are entitled to recover, the judgment to be entered in favor of plaintiffs for $616, with interest from November 19, 1859;

otherwise, judgment for defendant with costs. Notice of dishonor of the bill was admitted in the argument. The court below entered judgment for plaintiffs for $616, with interest from November 19, 1859. The defendants thereupon sued out this writ, and assigned the entry of judgment for plaintiffs for error.

STRONG, J. The question presented by the case stated is quite novel, and we have not been able to find that it has been adjudicated. Undoubtedly the acceptor of a bill of exchange is the principal debtor, and the drawer and indorsers are but sureties. Of course the acceptor even after payment, cannot sue either the drawer or indorser of the bill unless his acceptance was *supra protest*. His payment of the bill extinguishes it, but the case stated finds that the plaintiffs discounted the bill for the payees before it became payable, not that they accepted it or paid it. Discounting a bill, though it be done by the drawee, is neither acceptance nor payment. Acceptance is an engagement to pay the bill according to its tenor and effect when it becomes due, not before. A bill is paid only when there is an intention to discharge and satisfy it. In *Burbidge* v. *Manners*, 3 Camp. 194, Lord ELLENBOROUGH said "that even payment of a bill before it became due, does not extinguish it any more than if it were merely discounted," and added that "payment means payment in due course and not by anticipation." His lordship evidently thought that discounting a bill by a drawee is neither payment nor extinguishment. In *Attenborough* v. *McKenzie*, in the English Court of Exchequer, 36 Eng. Law and Eq. 562, it was held that if the acceptor of a bill discounts it, he may reissue it so as to charge the drawer; that nothing will discharge the drawer but payment, i.e., payment when due, or payment for the purpose of discharging and satisfying the bill. Therefore if the acceptor discounts the bill for the drawer and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although, at the time, the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount less the discount, be deemed a payment of the bill by the acceptor. In that case, the holder of the bill took it by indorsement after it was due from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it. It also decides that he does take it as an indorsee when he discounts it. Can then the drawee of a bill payable

on time, who has discounted it, maintain an action on it against the drawer or indorser if it be protested for non-payment and notice be given? He is not a party to the bill until he has accepted it. Until then, he has not assumed the position of principal debtor, nor undertaken any obligation in regard to it. His discounting has neither paid nor extinguished it, and it is not a promise to pay according to its tenor and effect. Is he precluded from becoming an indorser by the fact that the bill was directed to him? It seems well settled that the drawee of a bill may accept or pay it, *supra protest*, for honor of the drawer of indorser, and if he takes it up he stands in the position of an indorser paying full value for it, has the same remedies to which an indorsee would be entitled against all prior parties, and can of course sue the drawer of indorser (Chitty on *Bills*, 375). In such cases the fact that the bill was drawn upon him does not incapacitate him from acquiring the rights of an indorsee. No reason is apparent for a different rule where the drawee becomes the holder by discounting the bill before its dishonor. Uncertain whether the drawer will put funds into his hands to meet the bill at maturity, he may well refuse to accept, and yet may discount it on the credit of both the drawer and indorser. If he does not accept he is as much a stranger to it as any other person discounting it for the drawer or indorser; he is but purchasing the contract, and the contract thus purchased is that the drawee will pay the bill on presentment, when it shall fall due, or in case of his failing to do so, that the parties whose names are already upon it will pay, if due notice of its dishonor be given to them. The promise is made by the parties to the bill. The purchaser enters into no engagement.

Such being in our opinion the law, it was not error that the Court of Common Pleas gave judgment for the plaintiffs upon the case stated. The fact is not distinctly found that notice of dishonor of the bill was duly given to the defendants, but it was conceded on the argument that such was the fact, and that such is the meaning of the case stated.

The judgment is affirmed.

QUESTIONS

1. Would the decision have been the same in the principal case, if the plaintiffs had accepted the instrument before discounting it?
2. The N.I.L. provides that payment in due course by or on behalf of the principal debtor discharges the instrument. What constitutes payment in due course?

3. M pays a note to T with knowledge that T secured the note from H, a holder, by fraud. What are H's rights against M?
4. H is the holder of a note, indorsed by him in blank. M pays the note, receives it back, and loses it before maturity. T finds and sells it to X before maturity. What are the rights of X against M on the note?
5. P indorses a bill to Q; Q indorses it to R; and R indorses it to H. A refuses to pay the bill at maturity. Q, knowing of the dishonor of the instrument makes a tender of payment to H which H refuses to accept. H, having given proper notice of dishonor, brings an action against R. What decision?
6. H is the holder of a promissory note executed by M to the order of P. H enters into a contract with M by which he agrees to extend the time of payment of the instrument for thirty days. M refuses to pay the instrument at the time agreed. H notifies P of M's refusal to pay the instrument and brings action against him. What decision?
7. The N.I.L. provides that a negotiable instrument is discharged "by any other act which will discharge a simple contract for the payment of money." Payment before maturity of a simple contract debt will discharge it. Will such payment discharge the debt of negotiable contract?

BODINE *v.* BERG

82 New Jersey Law Reports 662 (1911)

BERGEN, J. The plaintiff, as assignee of the Mechanics' and Traders' Bank, Market Branch, of Brooklyn, New York, brought this suit against the defendants to recover the amount claimed to be due on two promissory notes, the first of which is in the following form:

"$4,435.50

"Brooklyn, N.Y., Aug. 31, 1908.

"On demand, after date, I promise to pay to the order of Mechanics' and Traders' Bank, Market Branch, forty-four hundred and thirty-five and 50/100 dollars at Mechanics' and Traders' Bank, Market Branch. Value received.

"C. Berg,
"Marie Berg."

The other note was dated October 12, 1908, and was in the same form except as to amount, which is $4,200. The notes came into existence under the following circumstances: Mr. Berg had obtained from the bank a loan on his individual note bearing date August 31, 1908, and in October of that year the officers of the bank becoming

dissatisfied called upon Mr. Berg to supply additional security, and agreed to accept his wife as surety. At the same time it appears that Mr. Berg's account was overdrawn to the extent of about $4,100, so the loan clerk of the bank, under the direction of Mr. Mailey, who was the manager of the market branch of the bank, in which position he had, as he testified, the same control as a cashier ordinarily has, prepared two notes, the first to represent the credit already given on August 31, 1908, and another for $4,200, to represent the overdraft, each note being dated October 12, 1908. Mr. Berg signed both, carried them to his wife, obtained her signature, brought them back, delivered them to the manager, and received from him the individual note dated August 31, 1908, and tore it up, and thereupon the date of the new note given for $4,435.50, was altered by erasing October 12 and inserting August 31 in its place.

Mr. Mailey, the general manager, testifies, "I still held in my possession the original note and gave Mr. Berg this new note, and he took it home and had his wife sign it and brought it back to me and tore up the old one, that is the one of C. Berg, and he gave me this one in the place of it, and the date was changed in my office, at my desk, in the presence of Mr. Berg, to have it correspond with my loan book, and also the original note." The real controversy in this case is over this note, and the effect of the alteration of its date, no defense being interposed to the note for $4,200, except payment, and that question was submitted to the jury.

There is no testimony in the case that the wife ever consented to, or had any knowledge of, the alteration of the date, but although the plaintiff produced evidence tending to show that Mr. Berg had knowledge of the alteration, he denied it, and this disputed question of fact was submitted to the jury by the trial court. Regarding the effect of the alteration of the note on the liability of the wife, the trial court charged the jury that "the legal effect of that change was to release the wife from any obligation on that note," to which exception was taken. A considerable portion of the brief of the plaintiff in error is based upon the Negotiable Instruments Act of this state (*Pamph. L.* 1902, p. 583), but the case is barren of any proof of the law of the State of New York (where this contract was made and delivered) relating to commercial contracts. The plaintiff did prove the law of New York state concerning the liability of married women, from which it appears that married women are not prohibited from assuming liability as surety. As there was no offer made to show what the

law of New York was regarding the alteration of commercial paper, the inference is that the common law still prevails there (*Waln* v. *Waln*, 24 Vroom, 429), and under it the alteration of the date of a contract is a material one and discharges all parties to the instrument from liability thereunder except those who have consented to it. *Master* v. *Miller*, 4 T.R. 320; 2 Sm. Lead. Cas. (8th ed.) 1277, and notes.

The note in the present case was altered in a material respect by the managing officer of the payee and retained as the property of the bank, without the knowledge of the wife, and if the party to whom the alteration is charged was not a stranger to the obligation altered, such change would release a non-consenting obligor, for a material alteration made by a party to a note or obligation will avoid it as against another party not consenting. 2 Cyc. 150, and cases cited; *Draper* v. *Wood*, 112 Mass. 315. It is urged that in making the alteration complained of the general manager of the bank exceeded his authority, and that therefore the alteration was made not by the bank, but by a stranger. We do not question the correctness of the proposition that the alteration of contracts by one not a party to them, or without authority therefor, would ordinarily be a spoliation which would not change the original contract between the parties to it, but the present case is not confined to such conditions, for here the general manager of the bank, in the due course of its business, accepted as its agent a note in substitution of another, and, as a part of the transaction, at once changed the date of the note from October 12, 1908, to August 31, 1908, for the declared purpose of making the date accord with the one to be given up. The act was done in furtherance of the interests of the bank by an officer having general powers over the making of loans and the acceptance of securities therefor, and, as claimed by plaintiff, with the consent and in the presence of one of the obligors, upon whom the change was binding, and the question is whether as to the non-consenting obligor, the alteration by the general manager of the bank was so foreign to his authority as to excuse the bank from all responsibility in the matter, and to make the general manager a stranger to the transaction.

We are of opinion that when the cashier or manager of a bank accepts a promissory note payable to the order of the bank with surety, in the place of one then held without surety, at the same time surrendering the unsecured note to its maker, and as a part of the transaction of acceptance alters the date of the new note to correspond

with that of the note surrendered, the bank is chargeable with the act of its officer as one done in the course of the business of the bank by a general agent, and it cannot, as to the non-consenting obligor, rely upon the altered note as evidence of the indebtedness, and at the same time disavow the act of its officer and agent and claim his action to be that of a stranger or beyond his authority.

In the present case, it is undisputed that while the bank held the note, chargeable with knowledge of its alteration by its own officer, it did not disavow the act but accepted payment on account thereof, and also, after its maturity, assigned the note as altered to the plaintiff who brings this suit on the note as changed. This amounts to a ratification by the bank of the act of its manager in altering the note when he accepted it for the bank, and therefore the alteration was not made by a stranger, but by the payee and holder at the time. We find no error in the conduct of the trial on this branch of the case.

Judgment affirmed.

QUESTIONS

1. Was the plaintiff in this case a bona fide purchaser or a holder in due course of the instrument in question? What would have been the decision of the court if the plaintiff had been a holder in due course?
2. H is the holder of a bill of exchange, accepted by A and indorsed to him by P. No place of payment being specified in the instrument, H, with P's consent, wrote in a place of payment. What are the rights of H on the instrument against A? against P?
3. In the foregoing case, X, a stranger to the bill, raises the amount of the bill. What are the rights of H on the instrument against A?
4. D drew a bill to his own order on A who accepted it. D, being unable to get it discounted, surrendered it to A. A tore it into pieces and threw the pieces into the wastebasket. D pasted the pieces together and indorsed the instrument to P. P indorsed it to H. H sues A on it. What decision?
5. H, holder of a note executed by M, accidentally tore it into two pieces. What are the rights of H against M on the instrument?
6. H is holder of a bill of exchange drawn by D on A and accepted by A. Before maturity, H states to A that he does not intend to collect the amount of the instrument. Later, H sues A on the bill. What decision?
7. In the foregoing case, H delivers to A a writing, stating that he does not intend to collect the amount of the bill. What decision in an action thereafter by H against A on the bill?

8. H, after having delivered to A the writing in question, indorses the instrument to X, before its maturity. X sues A on the bill. What decision?
9. After the death of P, a note to his order was found in an envelope among his papers with a memorandum to his personal representative that he, P, wished the note cancelled at his death. P's personal representative sues M on the note. What decision?
10. In what different ways may a negotiable instrument be discharged? In what different ways may a party of secondary liability be discharged?

f) Checks and Certificates of Deposit

FIRST NATIONAL BANK OF JERSEY CITY *v.* LEACH

52 New York Reports 350 (1873)

Appeal from a judgment of the general term of the Supreme Court, in the first judicial department, affirming a judgment in favor of defendant, entered upon a verdict. Action upon a check drawn by defendant, on the Ocean National Bank, dated November 21, 1871, for $1,410, payable on December 12, 1871, to the order of James Dolby. It was delivered to the payee and discounted for him by the plaintiff. At eleven o'clock, A.M., of December 12, plaintiff caused the check to be presented to the drawee for certification, and it was certified as good. The drawer had at that time sufficient money on hand to pay the check, and the amount thereof was charged to him. Within an hour or two thereafter the Ocean National Bank, drawee, suspended; and a receiver was appointed who took possession afterwards. Upon the same day the check was presented for payment and payment being refused, the check was protested. Upon these facts, in an action against the drawer of the check, the court directed a verdict for defendant, to which counsel for plaintiff duly accepted.

Peckham, J. The defendant drew the check, it was discounted by the plaintiff, and on the day when it was due it was presented by the plaintiff to the drawee, the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused, because between the time of its certification and its second presentment, the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check between these parties?

The theory of the law is, that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the

drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. The reason therefor is so strong that the law presumes it is adopted by the banks. (*Smith* v. *Miller*, 43 N.Y. 171.) It is found to have been done in this case. If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to bona fide holders, whether it had funds or not. It follows that after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his. If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good. For that reason, the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of that check. Hence, if the drawer should get the check back, he would strictly be entitled to get that money, not by virtue of his original deposit, but solely by surrender of the certified check, like any other holder.

But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then when the drawee accepts, it is an appropriation of the funds, *pro tanto*, for the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says, "That check is good; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it." The holder says, "No, I will not take the money; you may certify the check, and retain the money for me until this check is presented." The law will not permit a check, when due, to be thus presented and the money to be left with the bank for the accommodation of the holder, without discharging the drawer. The money being due and the check presented, it is his own fault if

the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time, within the statute of limitations.

The acceptance of a time draft at any time before due is entirely different; there the holder has then no right to the money, and the acceptor no authority to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such presentment, though the holder has a right to do it. The authority and the duty are to present for payment.

If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharge of the drawer. He cannot change the position and increase the risk of the drawer without discharging him. This would not discharge the drawer of a check who himself procured it to be certified and then put it into circulation. The reason of the rule fails to apply to him in such a case. I am not aware of any direct authority upon this question, but upon principle it must be held that the bank holds the money, after certification, not at the risk of the drawer, but at the risk of the holder of the check.

The judgment must be affirmed.

QUESTIONS

1. D draws a check on the A Bank, in which he has funds, to the order of P. P presents it for payment on the day of its issue and payment is refused. What are the rights, if any, of P against the A Bank?
2. In the foregoing case, the bank becomes insolvent between the time of the issue of the check and the time of its presentment for payment. What are the rights, if any, of P against D?
3. D draws a check on the A Bank, in which he has funds, to the order of P, has it certified, and delivers it to P. P seasonably presents the check for payment and payment is refused because the bank has failed. What are the rights of P, if any, against D?
4. What is the legal effect of a certification procured by the drawer? What is the legal effect of certification procured by one, other than the drawer and payee?
5. H is the holder of a check which has been certified by the drawee. H seasonably presents it for payment and finds that the bank has closed its doors. H contends that the certification of the check by the bank operated to constitute the bank as a trustee for him of the amount of the check and that he should not be compelled to share in the distribution of the assets of the bank as a general creditor. Is this contention well founded?

6. Is the drawer of a bill of exchange discharged by an acceptance of the drawee? Why should a drawer of a check be discharged by a certification of it by the bank on which it is drawn?
7. P is the holder of a check drawn by D on the A Bank. P has the check certified by the bank. In an action by P on the check, the A Bank contends by way of defense, that when the check was certified D had no funds on deposit. What decision?

FORREST *v.* SAFETY BANKING & TRUST CO.

174 Federal Reporter 345 (1909)

J. B. McPherson, D. J. This suit is brought upon a certificate of deposit issued by defendant in the following words:

"No. 1853.

"Philadelphia, Jan. 2, 1909. $3,000.00.

"Peter F. Fallon has deposited in the Safety Banking and Trust Company three thousand dollars to the credit of himself payable in current funds on return of this certificate properly indorsed on July 1, 1909. Interest $3\frac{1}{2}$ per cent per annum.

"H. J. Colver, Cashier H. L. Rock, Secy.

"This certificate of deposit is not subject to check and is payable only at maturity."

The certificate was properly indorsed in blank by Fallon, and passed into the possession and apparent ownership of J. J. West not long after its date. In March, 1909, West transferred it by delivery to the plaintiff, Forrest, for a valuable consideration and (as the jury has specifically found) in payment of his own debt. Payment having been refused at maturity, Forrest sued in his own name, and the principal question for decision is whether the action is properly brought in that form.

The answer must be in the affirmative if the certificate is a negotiable instrument, and to this point, therefore, the inquiry must be directed. It is undoubtedly true that, if the decisions in Pennsylvania are to govern, this court must hold that the plaintiff cannot sue in his own name. In *Patterson* v. *Poindexter*, 6 Watts & S. (Pa.) 227, it was decided that "An instrument in writing issued by a bank signed by the assistant cashier, 'I hereby certify that C. T. has deposited in this bank, payable twelve months from May 1, 1839, with 5 per cent interest until due, per annum, $3,691.63, for the use of R. P. & Co.,

and payable only to their order upon the return of this certificate,' is not a promissory note within the Statute of Anne, but a certificate of deposit on special terms."

This instrument was held to be negotiable for the purposes of transfer only, but not so far negotiable as to charge R. P. & Co. on their indorsement to the holder. This case was cited with approval in 8 Watts & S. 353, and 10 Pa. 31. In *Lebanon Bank* v. *Mangan*, 28 Pa. 452, an instrument declaring that "Mr. Jacob Miller has deposited in this bank $440, subject to his order and payable only on the turn of this certificate" was held to be non-negotiable; and in 36 Pa. 498, it was said of a similar instrument that it was not a negotiable instrument, and that a transferee thereof could only sue on it in the name of the depositor to the use of the transferee. If, therefore, I am bound by the Pennsylvania decisions, it must be decided that Forrest cannot maintain this suit in his own name, and that he is not entitled to judgment upon the record as it now stands.

The question may be for the moment, however, considered as one of general commercial law, and in that region, as is well known, a federal court is not bound by the decisions of a particular state, but may follow its own opinion, or an adverse current of authority elsewhere. (*Swift* v. *Tyson*, 41 U.S. 1.) Such a current may be discovered without difficulty. In the *American and English Encyclopedia of Law* (2d ed.) Vol. V, page 803, the following statement in the text is fully borne out by the citations in the accompanying note:

> A certificate of deposit drawn in the usual form seems to fulfil in every particular the definition of a promissory note, viz., an unconditional promise in writing for the payment of a sum certain in money absolutely and at all events. It is therefore held in all the states of the Union, except Pennsylvania, that the instrument is in substance and in legal effect a promissory note, and governed in most respects by the same general rules.

And in 5 Cyc., page 520, the result of the authorities (note 79) is summarized as follows:

> Whether a certificate of deposit is a note or merely a receipt for money has long puzzled the courts. Such certificate, however, if containing proper words to express that intention, is negotiable in the usual manner by indorsement, and although not negotiable in fact, if negotiable in form, it may be assigned. Moreover, where they are negotiable, their transfer is governed by the rules that apply to promissory notes, as is also the liability of the parties thereon.

Among these authorities is *Miller* v. *Austen*, 54 U.S. 218, where the precise question now under consideration was decided by the Supreme Court. The instrument sued upon in that case was in the following language: "I hereby certify that Hugh Short has deposited in this bank payable twelve months from the 1st of May, 1839, with 5 per cent interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate." This was held to be a promissory note within the statute of Ohio, which made such a note, drawn for a sum certain and payable to any person or his assigns, negotiable by indorsement. The certificate was indorsed successively by Miller and by Lockwood, and suit was brought against Miller by Austen, who was Lockwood's indorsee. The trial court refused to charge "that the paper offered in evidence is not a negotiable instrument under the laws of Ohio, and cannot be sued upon by the plaintiff in the cause," or that it was not a promissory note or bill of exchange. Upon exceptions to these rulings, the case went to the Supreme Court, where the judgment was affirmed in a brief opinion by Mr. Justice Catron. The decision has been frequently followed.

See, also, *Armstrong* v. *American Exchange Bank*, 133 U.S. 460, and *Bank of Saginaw* v. *Title, etc., Co.*, 105 Fed. 491. In the last-named case, Judge Acheson considered the subject and decided that: "A certificate of deposit in the ordinary form, payable to the order of the depositor, is a negotiable instrument possessing the qualities of a negotiable promissory note."

The present certificate is payable to Fallon or his order, for this is necessarily implied by the phrase "properly indorsed." As it seems to me, these authorities conclusively establish the right of the plaintiff to maintain this suit in his own name, if the question is to be decided as one of general commercial law. The defendant's motion for judgment notwithstanding the verdict is refused, and to this refusal an exception is sealed. Its motion for a new trial is also overruled, and judgment on the verdict may be entered in favor of the plaintiff.

QUESTIONS

1. What was the issue under consideration in this case? How was the issue decided? What rule of law can be deduced from this decision?
2. What practical difference did it make in this case whether the instrument under consideration was negotiable or not?

3. Why should there have been any doubt about the negotiable character of the instrument in question?
4. What is the legal relation of the bank to the depositor to whom the bank has issued a certificate of deposit? Is the bank a trustee for the payee? Is it a bailee? Is it a debtor?
5. Suppose that the bank should fail before the instrument came due, would the payee of the instrument be a preferred creditor? Would he be considered a general creditor?
6. The A Bank issued the following instrument: "Mr. Jacob Miller has deposited in this bank $440, subject to his order and payable only on the return of this certificate." When does this instrument mature? When does the statute of limitation begin to run against it? What is the effect of the N.I.L., section 70, on such an instrument?
7. In the instrument under consideration in the principal case it was provided that "this certificate of deposit is not subject to check." Would it have been subject to order by check in the absence of such a stipulation?
8. What is the business purpose of a certificate of deposit? Why should a person ever prefer a certificate of deposit to a checking account? Why should he prefer it to a savings account?

2. Stocks and Bonds

EAST BIRMINGHAM LAND CO. *v.* DENNIS

85 Alabama Reports 565 (1888)

Bill was filed by J. F. Dennis, against J. P. Mudd, and the East Birmingham Land Co., a private corporation; and sought to compel the transfer on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by the said Mudd, who had possession of it under a claim of ownership. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate with the blank indorsement thereon from a holder who had acquired it by purchase from Dearborn, and that it was lost by him or stolen from him, without fault on his part. Mudd purchased the certificate for full value from Wilson, Sage, and Clark, stockbrokers in Birmingham; and while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birmingham. A decree *pro confesso* was

taken against the corporation. On final hearing, on pleading and proof, the court rendered a decree for the complainant; and this decree is now assigned as error by each of the defendants separately.

Somerville, J. We concur in the conclusion reached by the judge of the City Court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it. The only question is whether Mudd, who paid full value for this stock without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent or negligence. The only exception to this rule is the case of a bone fide purchaser for value of negotiable paper. We have no reference, of course, to the taking of property for public use by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that under the facts of this case the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking house, whence it was abstracted by some unknown person, apparently without any fault on his part.

Nor does any question arise involving the rights of a subsequent bona fide purchase of stock from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner and not registered on the books of the corporation within fifteen days are declared by statute to be "void as to bona fide creditors or purchasers without notice." (*Fisher* v. *Jones*, 82 Ala. 117.) If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis himself by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of

Dennis, depends on whether a certificate of stock indorsed in blank by the owner is to be treated as negotiable paper.

The rule is well settled, that a bona fide purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title if he pays value for it without notice of the infirmity of the vendor's title. The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had in the absence of all negligence on the part of the owner, or his authority to make the sale. (*Mechanics' Bank* v. *N.Y. & N.H.R.R. Co.*, 13 N.Y. 599.) It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a bona fide assignee with full power to transfer the stock takes the certificate subject to the equities which existed against his assignor. "Such certificates," says COMSTOCK, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be in some respects like a bill of lading or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is that such instruments possess a sort of *quasi* negotiability, dependent upon the custom of merchants and the convenience of trade. They are not in the matter of transferability protected strictly as negotiable paper.

In *Shaw* v. *Spencer*, 100 Mass. 382, it was also decided that a certificate of corporate stock transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks, so as to derive title to himself directly from the last recorded stockholder, who is the only legal and recognized owner of the shares."

The same principle was applied to bills of lading, in *Gurney* v. *Behrend*, 3 Ellis & Bl. 622, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent without authority fraudulently transferred the

bill for value, and it was held by Lord Campbell that, for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

There is a class of cases not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases, it has often been held that the true owner, having conferred on the holder by contract all the external indicia of title and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith acquires it from the apparent owner." These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the receiver, rather than a stranger who has not been negligent in trusting anyone. (*Allen* v. *Maury & Co.*, 66 Ala. 10.)

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract.

The decree of the court below is in accordance with these views, and must be affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Would the court have reached the same conclusion, if the instrument in controversy had been a bill of exchange or a promissory note?
3. P, owner of a certificate of stock representing ten shares of stock in the X Company, indorses the certificate in blank, delivers it to A, and directs him to pledge it with X as security for a debt which P owes X. A sells and delivers the certificate to D, a bona fide purchaser. P sues D in trover for conversion of the stock. What decision?
4. What is a share of stock in a corporation? What does it represent? What functions does it perform?
5. In what sense is it a device for raising money or credit? Does it perform any function other than that of raising credit? If so, what?
6. What kind of credit is typically created and transferred by a bill of exchange? What kind of credit is typically created and transferred by a share of stock?

7. Does a certificate of stock possess as high a degree of transferability as a bill of exchange? To perform its function as a credit device, does it need to possess as high a degree of transferability as a bill of exchange?
8. The court says in this case that a certificate of stock is not negotiable like a bill of exchange. In what respects does it lack the qualities of negotiability possessed by a bill of exchange?

BENWELL *v.* CITY OF NEWARK

55 New Jersey Equity Reports 260 (1897)

Pitney, V. C. The question must be determined upon the true construction of the clauses of the bond recited above, viewed in the light of the meaning of the language among persons engaged in making, floating, negotiating, and investing in such securities. Several expert witnesses on this subject were sworn. They all agree substantially in declaring that securities of this kind in this country are grouped or classed as follows:

First, "Registered bonds." A registered bond is one which is a simple certificate of indebtedness in favor of a particular individual payable at a day named, with interest at days named. The name of the payee is entered on the books of the corporation debtor—municipal or private—as the registered owner, or, if it be a government bond on the register of the government. On the days when, by the terms of the bond or certificate of indebtedness, the interest falls due, it is paid directly to the registered creditor without presentation of the bond, usually by a check drawn to his order and sent by mail or, if he so demands, by cash in hand, but by long-settled course of practice the payment is made by check to the order of the creditor.

These bonds or certificates of indebtedness are not negotiable and can be transferred only by an entry on the books of the debtor corporation with a proper indorsement on the bond itself, or by the issue of a new certificate if it be a government indebtedness. The peculiar value of this class of securities lies in the fact that it is not necessary to produce them to the debtor at each time that the interest is due, and the danger of loss by robbery or fire is entirely removed. As they are usually made to run for a long term of years so that, as in the present case, the amount of interest in the aggregate is really greater than the principal, this peculiarity is of great importance.

Second, "Coupon bonds." These are made payable to bearer and are provided with interest warrants called coupons, for each installment of interest, also payable to bearer, which, when actually

detached, are negotiable and payable to bearer. The result is that a security of this class is passed easily from hand to hand—is convenient for use among bankers and moneyed institutions that desire a security which is easily, readily, and quickly convertible into money by sale, the title to which may be passed from hand to hand without any formality except the mere tradition of the paper. This ease of transfer gives this class of securities its peculiar value. The collection of the interest is made by simply detaching the coupon and presenting it at the place of payment, either directly or through the usual course of bank exchanges, where it is paid without inquiry as to the ownership of the bond from which it has been cut. The disadvantage of this sort of security is the danger of its loss by theft or fire.

These distinguishing characteristics make the registered bond more valuable to persons who desire a permanent investment and wish to eliminate the danger of loss by robbery or fire, such as large savings institutions and the like, while, as before observed, coupon bonds are more valuable for such as desire something easily negotiable from day to day.

A third class of bonds has its origin as follows: Parties desiring to borrow large sums of money naturally attempt to put their securities in such shape as to attract all classes of investors, and to that end have devised a third class of bonds, known as "convertible coupon bonds"—that is, coupon bonds which may at the option of the holder be converted into registered bonds. And this option is expressed in a clause contained in the bond itself, and when inserted produces a convertible coupon bond. The usual process of converting a coupon to a registered bond is to present the bond, cut off and surrender the coupons to the debtor, have the name of the creditor entered on a proper book kept by the debtor and a proper indorsement made upon the bond itself, showing its registration, thus reducing it, as nearly as possible, to the form and shape of an original registered bond. The complainants claim that the bond here in question belongs to this class.

Ordinarily, as everybody knows, a bond which has once been converted from a coupon bond into a registered bond cannot be reconverted into a coupon bond without the issuance of a new bond. This results from the fact that the ordinary registered bond does not include coupons for the payment of interest, and to convert a registered bond into a coupon bond would require the issuing of a set of coupons for each bond.

The desire, however, to have a bond which may be converted and reconverted at the pleasure of the holder, has given rise to a halfway process, producing a mongrel bond (a fourth class), known as a "registered coupon bond," which is registered as to the principal or body of the bond, but not as to the interest. The coupons remain negotiable and are collected precisely as if the principal had never been registered. They are payable to whoever presents them for payment, and no questions are asked as to whether the person presenting them is the registered owner and the holder of the bond itself or not. The advantage of this fourth class is that, after having once been registered, the bonds may be reconverted into pure coupon bonds by an assignment on the back payable to bearer, and having them so marked on the register of the debtor.

It will be observed that it is necessary to keep the coupons alive in order to give them this capacity of being reconverted into coupon bonds. Such bonds have been issued, in a few instances, by railroads, but very rarely so far as the evidence shows, by municipalities, and never by either the general government or any state government.

It is to be observed that this matter of conversion and reconversion is always, so far as appears, made optional with the holder.

Then there is, as claimed, a fifth class, which, however, as far as I understand the evidence can hardly be called a class, in which the coupons are registered as well as the bond itself but are not detached, so that the coupon becomes simply a convenient mode by which the holder of the bond, by means of a power of attorney or other written order, may collect his money.

I do not think the evidence warrants me in treating these last as a distinct class and a consideration of their peculiarities renders it quite certain that they have not heretofore, and will not probably come into any general use for the reason that once the coupons are registered and so marked on their face, they can never be restored to their original negotiable character.

QUESTIONS

1. What is the essential nature of a bond? Does it resemble more nearly a promissory note or a bill of exchange?
2. In what sense is a bond a device for raising credit? What kinds of credit are typically created and transferred by a bond? What qualities should a bond possess in order to perform well its function of raising credit?

3. Does a bond perform any function other than its credit function? If so, does it possess qualities which make it useful in the performance of such other functions?
4. What is a registered bond? Is it transferable? If so, how is it transferable? Is it negotiable by delivery or by indorsement and delivery? What are the utilities of a registered bond?
5. What is a coupon bond? Is it transferable? Is it negotiable by delivery or by indorsement and delivery? What are the utilities of a coupon bond?
6. What is a convertible coupon bond? What are the utilities of such bond?
7. Are the coupons attached to a coupon bond negotiable? What function or functions are performed by coupons?
8. Does a bond conform to the formal requirements of a negotiable instrument as developed by the law merchant? If not, in what respects are they lacking?
9. Does the N.I.L. apply to bonds and bond coupons so far as formal requirements are concerned?

EDELSTEIN *v.* SCHULER & CO.

Law Reports 2 King's Bench Division 144 (1902)

Bigham, J. This was an action in trover to recover the value of certain bearer bonds alleged to have been converted by the defendants to their own use. The bonds in question were those of the De Beers Consolidated Mines, Limited, the Denver and Rio Grande Railroad Company, the Mexican National Railroad Company, and the Union Pacific Railroad Company. All these were bonds of foreign corporations. There were also some bonds of the Bechuanaland Railway Company, which is an English company. The bonds were in the ordinary form of debenture securities.

It appeared at the trial that the plaintiff, to whom these bonds belonged, kept them in a safe in his office. They were stolen from the safe by one of the plaintiff's clerks. This clerk then from time to time employed a broker named Megson, who traded on the Stock Exchange at Bradford, to sell the bonds. Megson in the ordinary way of business sold them through the defendants, who are stockbrokers carrying on their business in the London Stock Exchange. The bonds were sold to jobbers either for cash or for the account, and when sold they were sent to defendants so that they might hand them to the jobbers in exchange for the price. When the defendants received the money, they remitted the amount to Megson, either in cash

or in account current, and he in his turn paid the money to the clerk. It was admitted that the defendants had no notice of any infirmity in the vendor's title, and that they acted throughout with perfect good faith. On discovering the theft, the plaintiff brought this action.

Neither the thief nor Megson was worth suing, and probably the plaintiff doubted whether he could make out a cause of action against the jobbers; but, whatever the reason, he selected the London brokers as the persons whom he would sue, and I have to determine whether they are liable. A body of evidence was called at the trial to show that all these bonds pass from hand to hand among the people who deal in them, and that they are treated as negotiable in the same way as the bonds of foreign governments. No serious attempt was made to refute this evidence, and it quite satisfied me that all the bonds in question belong to a class which bankers, stockbrokers, and others whose business it is to deal in such securities treat, rightly or wrongly, as negotiable and as passing from hand to hand by mere delivery. It is in these circumstances that the plaintiff seeks to fix the defendants with liability. He says that, though such bonds may in fact be treated commercially as negotiable, they are not in law negotiable; and he further says that even if lawfully negotiable, yet, as the defendants were never holders of them for value, they are liable in trover, having handled them with the intention of vesting the property and possession in the jobbers who bought them.

In support of the first of these two contentions Mr. Danckwerts argued that the attribute of negotiability could not be attached to a contract except by the law merchant; and that these bonds are of such recent creation that their negotiability under that branch of the law cannot be justified. It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that, in determining whether a usage has become so well established as to be binding on the courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities in my view creates no difficulty in the way of holding that they

are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being molded into a code; it is, to use the words of COCKBURN, C. J., in *Goodwin* v. *Robarts*, L. R. 10 Ex. p. 346, capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade; our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence. Thus it has been found convenient to treat securities like those in question in this action as negotiable, and the courts of law, recognizing the wisdom of the usage, have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether government bonds or trading bonds, foreign or English, can be called in question in our courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression "bearer bond" connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities. It would be a great misfortune if it were otherwise, for it is well known that such bonds are treated in all foreign markets as deliverable from hand to hand; the attribute not only enhances their value by making them easy to transfer, but it qualifies them to serve as a kind of international currency; and it would be very odd and a great injury to our trade if these advantages were not accorded to them in this country. But I am not to be guided alone by evidence and by questions of expediency. The point is entirely covered by authority. The arguments in support of the contention that these bonds are not negotiable were all adduced before, and carefully examined by, KENNEDY, J., in the case of *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658, and were dismissed by him as unsound. I have read the judgment in that case, and desire to say that I entirely agree with the conclusions and with

the reasons which lead up to them. I go, perhaps, further than KENNEDY, J., intended to go, for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the courts of law ought to take judicial notice of it.

The negotiability of the bonds being established, it is clear that the jobbers who bought them, having given value and having acquired them without any notice of infirmity in the vendor's title, could not be sued in trover by the plaintiff. But can the defendants, the brokers who assisted in perfecting the good title acquired by the jobbers, be sued? It is said they can. A broker who merely negotiates the sale of chattels without the authority of the true owner commits no tort at all. The sale is a mere void act. It divests the true owner of no right and it does not physically interfere with his control or possession of the goods. But if in addition to negotiating a sale the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorized sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner. It is argued that the defendants by what they did in handing the bonds to the jobbers have brought themselves within this rule of law. But, in my opinion, before the defendants had possession of the bonds at all or physically dealt with them in any way, they had become entitled to them for a valuable consideration just as effectually as the jobbers subsequently became entitled to them by paying the purchase price. When in the ordinary course of business, the defendants negotiated the sale of the bonds to the jobbers they came under a personal liability to the jobbers to deliver them. This liability they undertook at the request of Megson, who was acting for the thief, and in consideration of their undertaking the liability Megson, or the thief, promised that he would deliver to them the bonds; these circumstances, in my view, made the defendants holders for value, and, as the bonds were negotiable, gave them power to deal with the bonds. Or it may be put in another way. Megson in the ordinary course of business would look to the defendants (so long as they were solvent) and not to the jobbers, for the price of the bonds; it is the defendants whom he would treat as the buyers and to whom he would look, and in fact did look for his money; this is the way in which the transactions would be carried through, and although this course of business

does not make the defendants the buyers of the bonds, it makes them, in my opinion, holders for value as soon as they get possession of them and hand over the money in exchange for them. I think for these reasons that the defendants became as much holders of the bonds for value as the jobbers, and that they are entitled to the same protection.

Judgment for defendants.

QUESTIONS

1. The court held in this case that the defendants were purchasers of the bonds for value. On what theory did the court reach this conclusion?
2. What would have been the decision in this case, if the court had found as a matter of fact that the defendants were acting merely as agents in the disposition of the bonds under consideration?
3. Do you conclude from the decision in this case that the plaintiff has no remedy against anyone?
4. Why should there have been any doubt about the negotiable character of the bonds under consideration in this case?
5. H is the holder of a bond payable to "the registered holder." Is this instrument transferable by delivery? Is it transferable by indorsement and delivery?
6. The M Company issues a bond payable to the "order of the registered holder." Is this instrument transferablc by indorsement and delivery?
7. In the foregoing case, P is the registered holder. He indorses the bond to H and a proper transfer is made on the register of the corporation. The M Company fails to pay the bond at maturity. What are the rights of H against the M Company? against P, the indorser?

3. Liens

SINGER MANUFACTURING CO. *v.* MILLER

52 Minnesota Reports 516 (1893)

Defendant kept a public inn in Minneapolis called the Hotel Grace. On December 1, 1890, Carl Van Raden, his wife, and two children were received by defendant as boarders, at $15 per week. They remained until June 8, 1891. Among the effects which they brought to the inn was a Singer Sewing Machine. When they left, Van Raden owed $240.60 balance for their board. The defendant detained his goods, claiming a lien on them for this sum. The plaintiff, the Singer Manufacturing Company, then appeared and demanded the machine, claiming that it owned it and had leased it

to Van Raden and had given him an option to buy it for $25. Defendant had not before heard of this claim, but supposed Van Raden owned the machine. He refused to give it up, and the company brought this action in a justice's court, and at the trial proved its ownership, but was there defeated. Plaintiff then appealed to the District Court, where the facts were admitted to be as stated above. The judgment of the justice was reversed, and judgment entered for plaintiff, on the ground that Van Raden was a boarder and not a guest. The defendant appeals to this court.

VANDERBURGH, J. The court below found the facts as stipulated by the parties in the agreed statement of facts as submitted, and, as a legal conclusion, that the plaintiff was entitled to judgment. The defendant claimed an innkeeper's lien upon the chattel in controversy, a sewing machine, on the ground that it was brought to his hotel by a guest, who, it now appears, had contracted to purchase the same of plaintiff, but the title had not passed, though the possession had been delivered. The defendant, however, had no notice of the plaintiff's claim, and insists upon his lien thereon, with other goods of the guest, for the amount of his bill.

The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on goods in the possession of his guest *infra hospitium*, though they belong to a third person provided the innkeeper has no notice of that fact.

If the innkeeper's liability would attach in case the sewing machine were lost or stolen, it would seem but just to hold that his lien attaches whenever there is a corresponding liability. Schouler, *Bailm.* section 292; *Manning* v. *Hollenbeck*, 27 Wis. 202; *Threfall* v. *Borwick*, L.R. 7 Q.B. 711.

The respondent, however, claims that the judgment may be supported on the ground that the findings of fact show that the party who brought the machine to defendant's hotel was received as a boarder, and remained there as such, and not as a traveler or guest. The evidence is not here, and so the question is not whether it would support a finding either way, but whether it appears from the stipulated facts, which are adopted as the findings in the case, that he was a guest. To entitle the defendant to assert his innkeeper's lien, he must have received the property as the goods of a guest, but this does not appear, and there is no such finding. It appears from the agreed statement that he received the party, his wife, and two children as boarders and lodgers, and that they continued to board and lodge with

him for about six months at the rate of $15 per week, and that is all. This does not affirmatively establish the relation of guest and innkeeper, so as to subject him to the liability, or give him the rights incident thereto.

Judgment affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. Would the court have reached the same conclusion if it had been shown that Van Raden was a guest?
3. X engages a room in D's hotel as a guest and carries with him to the room a typewriter belonging to P. X, without having paid for his room, disappears, leaving the typewriter in the hotel. P demands the property as his. D refuses to surrender it. P sues D in trover. What decision?
4. S sells and ships goods to B by the D Railway Company. D refuses to deliver possession of the goods to B unless he will pay the transportation charges. B sues D in trover for conversion of the goods. What decision?
5. What is the nature of a lien? Why is a lien given to innkeepers on property of guests for unpaid charges? Why is a lien given to a common carrier on property of a shipper for unpaid transportation charges?

ARNOLD *v.* DELANO

4 Cushing's Massachusetts Reports 33 (1849)

Action of trover brought by the assignee in insolvency of Arthur Sowerby. The defendant had sold to Sowerby and Grant, partners, sixty-five cords of wood, which was measured off and marked with a stake to designate it from the rest. The wood was left on defendant's land, defendant giving six months' credit and taking Sowerby's and Grant's note for the price and agreeing to give the buyers one year within which to remove the wood. Later the partnership was dissolved and as part of the dissolution agreement, Grant conveyed to Sowerby all his right and title to the partnership property. At this time the partners, severally, as well as the partnership, were in fact insolvent. The plaintiff as assignee in insolvency of Sowerby demanded the wood from the defendant who refused to give it up until paid for it. After learning of the insolvency of the firm, defendant gave up the note which had been given for the price and received back the bill of sale which was held by the firm.

SHAW, C. J. There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price.

When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods, without being paid for them. The term "lien" imports that by the contract of sale, and a formal, symbolical, or constructive delivery, the property has vested in the vendee, because no man can have a lien on his own goods. The very definition of a lien is a right to hold goods, the property of another, in security for some debt, duty, or other obligation. If the holder is the owner, the right to retain is a right incident to the right of property; if he has had a lien, it is merged in the general property.

A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods until he is paid for them. But *conventio legem vincit;* and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.

But the law in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee becomes bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them, or if the goods are in the hands of a carrier, or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu*, then his lien is restored, and he may hold the goods as security for the price.

The principle we take to be well settled, but the difficulty which arises in practice—one which has given rise to so many cases—lies in determining what is such an actual change of possession from the vendor to the vendee, as shall be deemed to put an end to the vendor's lien. Some cases seem to be clear and illustrate the rule. If the

goods are delivered to the vendee's own servant, agent, wagoner, or shipmaster, that is in law a delivery to the vendee himself. So, if goods are stored in a common warehouse, as the dock warehouses at the London docks, and entered in the books as the property of A. B. and deliverable to him and a dock warrant is issued and afterward, upon the proper order of A. B. on the warrant, the whole or a part are transferred to C. D. and entered in like manner in his name, this is an actual change of custody, control, and possession, though the goods are not moved from their position. So, if the seller sustain different characters, as if a person who is a livery-stable keeper, having a horse to sell, makes a sale to C. D., and then transfers the horse to his livery stable to be kept for C. D. at a stipulated weekly hire, this may be regarded as an actual change of custody and possession.

But by far the most common case which occurs, is where goods are ordered by letter, on credit, to be sent from one country to another, or from one part of the same country to another, and are accordingly forwarded by a common carrier. There, as the carrier is not a servant of the vendee, the goods, though they have left the actual possession of the vendor, if they have not reached the actual custody of the vendee or the ultimate place of destination ordered by him, may be stopped *in transitu* by the vendor; and if he can thus stop them, he regains his lien.

Now to apply these rules to the present case, it appears to us very clear that there was a good sale and delivery of the wood to Grant and Sowerby. The wood was measured and marked off, so that the very sticks composing the sixty-five cords could be identified. And the reason why marking, measuring, weighing, etc., is necessary, is that the particular goods may be identified. If ten barrels of oil are sold lying in a tank of thirty barrels, the buyer can identify no part of it as his, until it is measured. So, if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation. But, if they are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes; as if in the last case there are one hundred bales of cotton numbered from one to one hundred, and the contract is for the fifty odd numbers or the fifty even numbers or any other specified fifty numbers, the bales sold are identified though not separated. In the present case the wood was marked off and identified, and the vendees had a license for one year to come on to the vendor's land and to take it away.

This was a complete sale and a constructive delivery so as to vest the property in Grant and Sowerby; and, on their dissolution and transfer, it vested in Sowerby, and by the assignment, in his assignee. Then, the question is whether the defendant had, under the circumstances, a lien for the price, and we think he had.

The purchasers had a license to go on to the defendant's land and take the wood; whether this license was revocable or not, it is not necessary to consider, as it was not in fact revoked. But the vendees did not enter and take the wood; it remained on the vendor's land, and in his possession, in the same manner as before and at the time of the sale. The vendor acted in no new capacity; he was to receive nothing for keeping; he was precisely in the condition of a vendor who had not parted with the possession and custody of the goods sold. And this was the state of things when Sowerby went into insolvency; upon which event, we think, the vendor was remitted to his right to keep possession of the wood as security for the price. Such a vendor in possession is regarded as having a higher equity to retain for the price than the assignee of a debtor, who has not paid for the property, has to claim it for the general creditors.

The fact that, after the proceedings in insolvency commenced and became known to the defendant, he applied to Sowerby and got back the bill of sale, cannot of itself, we think, avail the defendant. The insolvent could not, in that state, vacate the sale or reconvey the property; and if the wood was worth more than the lien of the defendant upon it, we think that the assignee, on paying the defendant the price, was entitled to the wood for the benefit of the general creditors; and this was a right which the insolvent could not defeat.

Judgment for the defendant.

QUESTIONS

1. Had title to the wood passed to Sowerby and Grant? If so, by virtue of what right was the defendant entitled to retain possession of it? For what purpose was the defendant entitled to retain possession of the property?
2. Suppose that Sowerby, before his insolvency, had called for the wood and that the defendant had prevented him from taking it away, what would have been the rights of Sowerby and Grant against the defendant?
3. S sells a horse to B. Nothing is said about the payment of the purchase price or the delivery of the animal. B demands possession of the horse.

S refuses to surrender possession until S has paid the purchase price. B sues S in trover for conversion. What decision?

4. In the foregoing case, S voluntarily surrenders possession of the horse to B. What are the rights of S against B?
5. S agrees that B may take the horse for temporary use. B, while in temporary possession, sells the horse to P, a bona fide purchaser. S sues P for the possession of the animal. What decision?
6. D borrows $500 from P and deposits with P a Liberty bond, the face value of which is $1,000, to secure the repayment of the money. What is the nature of the relation between P and D? What are the rights of P with respect to the bond?
7. P leaves his automobile with D to be repaired. P demands possession of his property when the repairs have been made. D refuses to surrender possession unless P will pay for the repairs. P sues D in trover for conversion. What decision?
8. In the foregoing case, D refuses to surrender possession of the machine unless P will pay for the repairs and for gasoline which P has previously purchased on credit. What decision in an action by P against D in trover for conversion of the automobile?
9. P builds a house for X, who, before P is paid for his work and materials, sells the house to D. What are the rights of P against X? against D? against the property?
10. Examine the statutes of some state in which you are interested and make a brief digest of the statutory provisions relating to mechanics' liens.

BRANAN BROTHERS *v.* ATLANTA & WEST POINT RAILROAD CO.

108 Georgia Reports 70 (1899)

Little, J. Branan Brothers instituted an action in trover against the Atlanta & West Point Railroad Company and C. V. Truitt, to recover ten boxes of tobacco. The evidence made substantially the following case: Spencer, Traylor & Company sold to Cunningham, a merchant in LaGrange, ten boxes of manufactured tobacco on a credit, and delivered the same to the Richmond & Danville R.R. Co. at Danville, Va., to be forwarded to Cunningham, taking from the railroad company an ordinary bill of lading, which the consignors transmitted to the consignee. The tobacco arrived in LaGrange over the Atlanta & West Point R.R., and was placed in the warehouse of the company for delivery. Cunningham became insolvent, and was indebted to the firm of Branan Brothers in the

sum of $176. A member of that firm called on Cunningham for the payment of the debt; the latter proposed to pay the bill with the tobacco which was then in the warehouse of the railroad company and had not been delivered. The proposition was accepted. Cunningham gave an order on the agent of the Atlanta & West Point R.R. to deliver to C. I. Branan the tobacco then in the carrier's possession, consigned to him, being the tobacco which had been shipped by Spencer, Traylor & Co. At the time of the delivery of the order, Cunningham also delivered to Branan Brothers the bill of lading for the tobacco, which was an ordinary contract of affreightment, specifying the name of the consignor and the goods shipped, and stipulating that they were to be transported to LaGrange and delivered to Cunningham. There was no indorsement or assignment of the bill of lading, nor did Branan Brothers know that the tobacco had not been paid for. After receipt of the order and bill of lading, the representative of the firm presented the order and bill of lading to the agent of the railroad company, paid the freight on the same, went to the place in the depot where the tobacco was deposited, put his hands upon it and told the agent that he desired to mark it to his firm at Atlanta. The agent said that he would take charge of it for Branan Brothers and ship it to Atlanta, consigned to that firm as directed, and in pursuance of such understanding gave to Branan Brothers a receipt in the following words: "Atlanta & West Point R.R., LaGrange, 4/21/92. Received from Branan Brothers ten boxes tobacco, 550. Consignor, Branan Brothers. Destination, Atlanta, Ga. A. R. Ravenscroft, Agent." The purchase was in payment of an antecedent debt, and the price reasonable. Cunningham did not go to the depot with the representative of the firm. Later on in the day, and while the tobacco was in the warehouse awaiting shipment to Atlanta, Spencer, Traylor & Co. notified the railroad company not to deliver the tobacco to Cunningham, but to deliver the same to Truitt, one of the defendants in error. This was done, and the action was brought by Branan Brothers to recover the tobacco.

On the trial the jury, under the charge of the court, rendered a verdict in favor of the defendants. A motion for a new trial was made on several grounds, and overruled. The plaintiffs excepted. A number of grounds are set out in the motion for a new trial, but inasmuch as the case turns upon the question of a proper construction of the law regulating a vendor's right of stoppage *in transitu*, we find it more satisfactory to discuss and apply to the facts of the

present case the rules of law which govern such stoppage, than to formally pass upon the several grounds of the motion.

There are several definitions of this right given by text-writers, as well as made by adjudicated cases, which we have examined with some interest. Chancellor Kent, in the second volume of his *Commentaries*, page 702, defines the right of stoppage *in transitu* to be that which the vendor has, when he sells goods on credit to another, of resuming possession of the goods while they are in the possession of the carrier or middleman in the transit to the consignee or vendee and before they arrive into his actual possession or the destination he has appointed for them, on his becoming bankrupt and insolvent. The Supreme Judicial Court of Massachusetts, 131 Mass. 457, declares that the right of stoppage *in transitu* is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property but not the possession. Mr. Hutchinson in his *Law of Carriers*, section 409, says that this right is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts, and that if after the vendor has delivered the goods out of his own possession, and has put them into the hands of the carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. An interesting discussion of the seller's right of stoppage *in transitu* is found in Professor Burdick's treatise on the *Law of Sales of Personal Property*, page 217. This author declares that this right is not founded on any contract between the parties, nor on any ethical principle, but upon the custom of merchants, that while it is analogous to the right of lien, the two differ in some important respects. That is, the right of lien is not available unless the seller is in possession of the goods in the character of an unpaid former owner, and this right is determined as soon as the buyer or his agent lawfully obtains possession. On the other hand, the right of stoppage *in transitu* does not come into existence until the goods have passed out of the vendor's possession into the hands of a carrier for transmission. It is immaterial, however, for the purposes of this discussion, to ascertain whether the right is in the nature of a lien, or exists under certain well-defined rules and regulations, as it is a right which is favored by the courts. It is essential, however, to the exercise of the right that the goods should

be in transit at the time. Mr. Parsons, in his *Law of Contracts* (Vol. I, bottom of p. 624), says that it is sometimes difficult to determine whether the goods which it is sought to stop are still *in transitu*, and declares that it is well settled that goods are *in transitu* not only while in motion, and not only while in the actual possession of the carrier, but also while they are deposited in any place distinctly connected with the transmission or delivery of them, or, rather, while in any place not actually or constructively the place of the consignee, or so in his possession or under his control that the putting them there implies the intention of delivery. And again, on page 626 of the same volume, this author declares that they are in transit until they pass into the possession of the vendee.

Our Civil Code, section 2285, declares that the right continues until the vendee obtains the actual possession of the goods; and it is also declared in section 3552 of the same code, that, if the goods are delivered before the price is paid, the seller cannot retake because of failure to pay, but, until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid. Again, it is provided by section 3553 of the same code, that a bona fide assignee of a bill of lading of goods for a valuable consideration, and without notice that the same were unpaid for, and the purchaser insolvent, will be protected in his title against the seller's right of stoppage in transit. These three sections of the code, taken together, seem to declare the proposition that until the goods actually come into the possession of the consignee the right of stoppage *in transitu* continues, and the only exception made is that a bona fide assignee of the bill of lading for a valuable consideration who has no knowledge that the same have not been paid for, and the purchaser insolvent, will be protected against this right.

The claim of the plaintiffs in error in this case is that the sale made to them by the consignee and the subsequent recognition of such sale by the carrier and the agreement on its part to reship the goods was such a delivery as vested in them title to the goods free from the right of stoppage *in transitu*. It must be remembered, however, that nothing will defeat this right except actual possession of the goods by the consignee, or an assignment of the bill of lading, which is symbolic delivery of the property. Neither of these things was done. Cunningham never did have possession of the goods. The bill of lading was never assigned by him to plaintiffs in error. It cannot be doubted, under the facts which appear in the record,

that Branan Brothers purchased the goods in good faith from Cunningham, the consignee, but it cannot be insisted that by such purchase they obtained any better title than Cunningham, the consignee, had when the goods were delivered to the carrier in Danville, Virginia. The legal effect of such delivery was to vest the title in Cunningham and it so remained, but the title which he held was subject to the right of the vendor to stop the goods before actual delivery. He could convey to the purchaser from him no more than he had; and therefore Branan Bros., taking Cunningham's title, took the tobacco subject to the right of the vendor to stop it so long as it remained in the hands of the carrier. *Holbrook* v. *Vose*, 6 Bosworth (N.Y.), 76. If it be said that the goods were not in the hands of the carrier for delivery to the consignee, the reply is, that as long as the company in any capacity, except as agent of the consignee, has control of the goods, whether carrier or warehouseman, the vendor's right is not terminated; for as long as anything remains to be done in order to complete a delivery to the consignee, that long the right of stoppage *in transitu* endures. 4 Elliott, R. 2395, and note 3, making reference to a large number of adjudicated cases. There had been no actual delivery of the goods either to the consignee or Branan Brothers. Under the authority of *Macon & Western Ry. Co.* v. *Meador*, 65 Ga. 705, the delivery to the latter was constructive, not actual. Without actual delivery or the legal symbol of it, the purchaser could not defeat the right. Subject to this right, the purchaser changed the destination, to which change the carrier assented, but while in its hands as carrier, before the goods had been started to their new destination, the right to stop was exercised; and so long as they remained in the possession of the carrier and it had control over them, the right existed in the original vendor as against the consignee who had never had them, and a purchaser from them who bought subject to the right. In our judgment the court committed no error in the charge of which complaint was made. The verdict for defendants is in accordance with the law and evidence, and the court committed no error in overruling the motion for a new trial.

Judgment affirmed.

QUESTIONS

1. Had the title to the goods in controversy in this case passed to Cunningham? If so, why were the plaintiffs not granted a recovery in trover?
2. Would the decision have been the same in this case, if the carrier had actually delivered the goods to Branan Brothers? Would it have been

the same if Cunningham had indorsed the bill of lading to Branan Brothers? Would it have been the same if the carrier had shipped the goods to Atlanta on the order of Branan Brothers?

3. S sells and ships goods to B by the D Railway Company. He sends to B a bill of lading to B's order. S, learning of B's insolvency, notifies the D Company to hold the goods until further notice. The D Company, in violation of this notice, delivers the goods to B upon the production of the bill of lading. B sells the goods to C, a bona fide purchaser. What are the rights of S against the D Company? against B? against C?
4. Under what circumstances can a seller stop goods *in transitu?* What is the theory underlying this power?
5. When does transit begin? When does it end? What kind of notice must the seller give? To whom must the notice be given?

4. Mortgages

TOOMER *v.* RANDOLPH

60 Alabama Reports 356 (1877)

The defendant in this case was the holder of one Cabell's note secured by a mortgage on land. The defendant, as mortgagee, had taken possession of the mortgaged land. Cabell defaulted in the payment of the note and the defendant exercised his power of sale contained in the mortgage deed. The plaintiff held a second mortgage on the same land to secure a debt which Cabell owed to him. This is an action of garnishment by the plaintiff against the defendant, seeking to garnish the defendant as debtor of Cabell. The trial court gave judgment for the defendant.

Brickell, C. J. A mortgagee, if there is not in the mortgage a stipulation to the contrary, or a reservation by the mortgagor of possession until default in the payment of the mortgage debt, has the immediate right of entry and may eject the mortgagor or his tenants. (*Duval* v. *McLaskey*, 1 Ala. 737; *Welsh* v. *Phillips*, 54 Ala. 309.) The theory of a mortgage, prevailing in this state, is that, at law, it creates in the mortgagee a direct, immediate estate in the land—a fee simple, unless otherwise expressly limited. The estate is conditional—annexed to the estate is a condition, which may defeat it. If the mortgagor, not having reserved the right of possession until default in the performance of the condition, remains in possession, he is the mere tenant at will of the mortgagee. After the law day, and default in the performance of the condition, the

estate vests absolutely in the mortgagee—the fee is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which, as between mortgagor and mortgagee, courts of law do not take notice. Before default, all that remains in him is the right to perform the condition, and thereby restore his original estate. (*Pauling* v. *Baron*, 32 Ala. 11; *Welsh* v. *Phillips*, *supra.*)

In courts of equity, the theory of a mortgage is, that until foreclosure it is a mere security for a debt, the mortgagor continuing the real owner of the fee. From this theory results the general principle that a mortgagee in possession, before or after default in the payment of the mortgage debt, and before foreclosure, is a trustee of the rents and profits for the mortgagor, and bound to apply them in extinguishment of the mortgage debt. (*Davis* v. *Lassiter*, 20 Ala. 561.) All reasonable expenditures for taxes, necessary repairs, and other necessary expenses incurred on account of the estate, the mortgagee is allowed to retain from the rents and profits; and it is the balance only which may be applied in extinguishment of the mortgage debt. An accounting is necessary to the ascertainment of the balance. The law does not apply the balance of the rents and profits to the mortgage debt; for, at law, they accrue to the mortgagee, as the owner of the legal estate. It is in equity only that the application is made, in the nature of an equitable set-off, and as an incident to the right of redemption.

If it is admitted that the mortgagor, notwithstanding the second mortgage to the appellants, has a right to compel the application of the rents received by the appellee while in possession, to the payment of the mortgage debt, the remedy is exclusively in equity, and is incidental to the right of redemption. In a court of law, the appellee is regarded as having received only and simply the issues of his own estate. A garnishment is strictly a legal proceeding, operating only on the rights of the defendant in attachment of judgment, which he could in an action at law enforce in his own name. It cannot be converted into a method of drawing within the jurisdiction of courts of law matters and rights of purely equitable cognizance. (19 Ala., 135; 54 Ala., 246.)

What may be the rights of the appellants, as subsequent mortgagees, cannot be considered or determined in the present proceeding. A garnishment is not a remedy for the enforcement of any cause of action vesting only in the creditor suing it out. Its whole score and

operation is to subject legal demands recoverable only by the debtor, or property of his which is subject to execution.

The judgment is affirmed.

QUESTIONS

1. What was the issue under consideration in this case? How was it decided? What rule of law can be deduced from the decision?
2. What is the nature of a mortgage transaction? How would you distinguish a mortgage from a pledge?
3. Under the doctrine of the principal case, who has the legal title to the mortgaged premises? What does the other party to transaction have, if anything?
4. What is meant by the mortgage debt? What is the "law day"?
5. Is the theory of the mortgage relation the same in a court of equity as in a court of law?
6. D executes a mortgage to C to secure a debt which the former owes the latter. Who is entitled to possession of the mortgage premises before default in the payment of the mortgage debt? Who is entitled to possession after default?
7. If the mortgagee is entitled to take possession of the mortgaged premises, before or after default, is he entitled to collect the rents and profits from the land? If so, how must he deal with them?
8. If the mortgagor is in possession of the premises, is he entitled to the rents and profits? How may he dispose of them?
9. Under the doctrine of this case, what is it that vests legal title to the mortgaged property in the mortgagee? Is it the mortgage itself? Is it the taking of possession of the mortgaged premises by the mortgagee?
10. D mortgages Blackacre to C to secure a debt owed by the former to the latter. On law day, D tenders payment of the debt to C which C refuses to accept. What is the effect of a valid tender of payment and a refusal to accept it by the mortgagee?
11. When the debt matures, the mortgagor fails to pay it. What is the effect of his default in a court of common law? In a court of equity?
12. What is the purpose of a mortgage? In what sense, is it a device for securing credit?
13. What property may be mortgaged? What is the difference between a real property mortgage and a chattel mortgage?
14. How is the interest of the mortgagor in the mortgaged premises designated? Is it transferable? Is it subject to attachment? to levy and execution sale under judgment?
15. How is the interest of the mortgagee in the premises designated? Is it a transferable interest in the property? Is it subject to levy and execution sale?

TRIMM *v.* MARSH

54 New York Reports 599 (1874)

Earl, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold in execution against him?

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England, the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to-wit, payment at the law day. In default of such payment, title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

The common-law rule, as modified by the equitable principles alluded to above, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become invested with the legal title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and in many other states of the Union. But this common-law rule has never, to its full extent, been adopted in this state. Here the mortgage has, both in law and equity, been regarded as a mere chose in action, a mere security of a personal nature.

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a

reconveyance by the mortgagee, with his title. But tender of payment after the law day did not have this effect, and in such case a reconveyance was necessary; and such is still the rule in England and in many of the states of the Union. But it has always been the law of this state that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term *law day,* which occupies such a prominent place in the early discussions as to mortgages, has no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this state to call the mortgagor's right in the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this state the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that the possession of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes, which prohibits an action of ejectment by the mortgagee to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the land. How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged for security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to his heirs. Payment or even tender would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession.

The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. JUDGE COMSTOCK, in *Kortright* v. *Cady*, 21 N.Y. 343, says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment, by the mortgagor, is but a right to recover or to retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the land. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but when its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such a case, the mortgagee also has such an estate in the land as can be sold upon execution, because, if he has, it does not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold upon execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by the possession. He has no interest in the real estate which he can sell, or which can be sold, separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of a mortgage without the debt is a mere nullity (*Merritt* v. *Bartholick*, 36 N.Y. 44).

QUESTIONS

1. Compare the theory of a mortgage under the doctrine of this case with the theory of a mortgage under the doctrine of *Toomer* v. *Randolph*, *supra*, page 487. Which of the two theories is the more advantageous to the mortgagor? to the mortgagee?
2. Under the doctrine of this case, what is the nature of a mortgage transaction? How would you distinguish a mortgage, under the theory of this case, from a pledge?

3. Who is entitled to the possession of the mortgaged premises under the doctrines of *Trimm* v. *Marsh?* How will the rents and profits issuing from the mortgaged premises be disposed of under the theory of this case?
4. D mortgages Blackacre to C to secure a debt owed by the former to the latter. At maturity, D tenders payment of the debt to C which C refuses to accept. What is the effect of the tender under the doctrine of the principal case?
5. D fails to pay the debt when it is due. What is the effect of his default in a court of law under the theory of *Trimm* v. *Marsh?* in a court of equity?
6. Did the mortgagor, in the principal case, have an interest in the land which could be sold on execution sale? Did the mortgagee have an interest in the land which could have been sold on execution?
7. D borrows $5,000 from C and executes a mortgage on Blackacre to secure the payment of the debt. C assigns his claim against D to B but does not assign the mortgage. What are the rights of B under the doctrine of the principal case? under the doctrine of *Toomer* v. *Randolph?*
8. After default, what is the proper course for the mortgagor to take for his protection under *Toomer* v. *Randolph?* under *Trimm* v. *Marsh?*
9. After default, what is the proper course for the mortgagee to take under *Toomer* v. *Randolph?* under *Trimm* v. *Marsh?*

5. Bills of Lading and Warehouse Receipts

SHAW *v.* MERCHANTS' NATIONAL BANK

101 United States Reports 557 (1879)

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "WDI." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On November 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to

the Bank of North America. On November 14, the last-named bank sent the draft—the original bill of lading still being attached thereto—to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterward, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on December 9, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of the word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine: first, whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading. Second, whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Esrey thereupon sued out this writ of error.

Strong, J. The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title

than their vendors had. The inquiry, therefore is what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft, in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank. In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both states enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply they "shall be negotiable and may be transferred by indorsement and delivery"; while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; i.e., by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterward, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit

in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a bona fide holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J.,

it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instrument in favor of bona fide holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it, that is, nothing short of mala fides will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Goodman* v. *Simonds*, 20 How. 343; *Murray* v. *Lardner*, 2 Wall. 110; *Matthews* v. *Poythress*, 4 Ga. 287. The rule was first applied to the case of a lost bank note (*Miller* v. *Race*, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in *Peacock* v. *Rhodes* (2 Doug. 633), to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is

established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in *Goodman* v. *Harvey*, *Goodman* v, *Simonds*, *Murray* v. *Lardner* (*supra*), and in *Phelan* v. *Moss* (67 Pa. St. 59), is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser, and

he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

Judgment affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. What is a bill of lading? In what sense is it a device for securing credit? What qualities does it possess which enables it to perform well this function?
3. Does the bill of lading perform any function other than that of securing credit?
4. Suppose that Miller & Brother had sold the bill of lading to the defendants; and that the defendant had secured the goods by means of the bill of lading; what would have been the decision in this case?
5. What was the decision of the Court in *Commercial Bank* v. *Armsby*, *supra*, page 104?
6. The jury found in the principal case that Miller & Brother had bought the bill of lading in bad faith from Kuhn & Brother. Suppose that the jury had found that Miller & Brother had purchased the document of title in good faith, what would have been the decision in this case?
7. H is the holder of a bill of lading, to his own order and indorsed in blank. He loses it. It is found by T and sold to D, a bona fide purchaser. D presents the bill of lading and secures possession of the goods. He refuses to deliver them up to H on demand. H sues D in trover for conversion of the goods. What decision?
8. S ships goods to B; he draws a draft on B for the price of the goods; to the draft he attaches a bill of lading, to his own order, indorsed in blank; he forwards the draft and bill of lading to the A Bank, in B's city, with direction to the bank to deliver the bill of lading only on payment of the draft. T steals the bill of lading from the bank and sells it to D, a bona fide purchaser. D presents the bill of lading and secures the goods. He sells them to X. (*a*) S sues D in trover for conversion of the goods. (*b*) B sues D for conversion of the goods. What decision in each case?

9. What is meant by *negotiation?* What elements of negotiability did the legislature intend to give to bills of lading? What elements of negotiability do bills of lading need to perform well their functions?

EMERY'S SONS *v.* IRVING NATIONAL BANK

25 Ohio State Reports 360 (1874)

Thomas Emery's Sons, plaintiffs in error, a firm doing business in Cincinnati, Ohio, had, before the dates hereinafter named, transacted business with one Mirrielees, a produce broker in the city of New York, which resulted in leaving a balance due from Mirrielees to the plaintiffs in error. This was the nature of the transaction: Upon the order of Emery's Sons, Mirrielees purchased goods in New York, on his own account, and shipped the goods to them at Cincinnati by a common carrier with which Emery's Sons had special arrangements for freight, upon an agreement that Emery's Sons would pay him the cost of the goods at New York and 1 per cent commission added. It was usual for Mirrielees, upon making shipment of goods, to take from the carrier a bill of lading, and to draw upon them for the price of the goods and his commission, and at the same time to obtain a discount of the drafts with bills of lading attached, from the Irving National Bank at New York. These drafts had uniformly been honored by the drawee upon presentation by the bank.

On March 24, 1869, Mirrielees shipped three casks of stearine to Emery's Sons, by the Atlantic Time Line, and took from the carrier a receipt or bill of lading, the material part of which reads as follows: "New York, March 24, 1869. Received from G. M. Mirrielees the following packages (contents and value unknown), in apparent good order, and marked as in the margin. (3) Three casks stearine. For Thos. Emery's Sons." In the margin was written "Cin., O." Thereupon, Mirrielees drew his bill of exchange as follows:

"New York, March 24, 1869.

"$299.21

"On demand, pay to the order of myself, two hundred and ninety-nine 21/100 dollars, value received, and charge the same to account of 3 casks stearine.

"To Messrs. Thos. Emery's Sons, Cincinnati.

"G. M. Mirrielees."

And, having indorsed the same, on the same day, delivered it, with the bill of lading, to the defendant in error, who paid value therefor. At the same time Mirrielees sent to Emery's Sons a letter as follows:

"New York, March 24, 1869.

"Messrs. Thomas Emery's Sons, Cincinnati:

"Gentlemen: Herewith please find invoices of 3 casks stearine, amounting to $299.21, for which I have valued this day.

Yours truly,

"G. M. Mirrielees."

On the 26th of the same month, Mirrielees shipped 10 hogsheads of stearine to Emery's Sons and on the same day drew a draft on them for $1,098.42. This draft, with the bill of lading attached, he sold also to the defendant in error, the Irving National Bank. Irving National Bank forwarded these respective drafts, with bills of lading attached, for collection, on the 26th and the 27th of the same months; but upon presentation to the plaintiffs in error, payment was refused. After these bills of lading had been thus transferred to the Irving National Bank, Emery's Sons received and sold both shipments of stearine, and refused to account to the bank for the proceeds or price. The original action was brought in the Superior Court of Cincinnati by the bank, to recover the amount of the proceeds of sales. The defendants, by way of defense, insisted that they might rightfully retain the money, and apply it on the indebtedness of Mirrielees to them.

On the trial, at special term, the court rendered judgment in favor of the defendants. The plaintiff moved for a new trial, which motion was overruled, and a bill of exceptions, embodying all the testimony, was taken. On error the court at general term reversed the judgment rendered at special term, and remanded the case to special term with instructions to the court to proceed to render a judgment in favor of the plaintiff. Thereupon, the court at special term, without granting a new trial, proceeded to render judgment in favor of the plaintiff. This proceeding is prosecuted to reverse the judgment of reversal rendered by the court at general term, and the judgment subsequently rendered at special term, in favor of the plaintiff below.

McIlvaine, C. J. Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question, whether the

title thereby passes from the vendor to the vendee, depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction.

If the goods be shipped in pursuance of the purchaser's order and at his risk, or if it otherwise appear to be the intention of the shipper to part with the title, the carrier becomes the agent of the consignee, and the delivery to him is equivalent to a delivery to the purchaser. If the vendor, however, in making the consignment and delivering the goods to the carrier, does not intend to part with his title to and control over them, the carrier must be regarded as the agent of the consignor and not of the consignee.

In all such transactions, the bill of lading is an important item of proof as to the intention, but it is not necessarily conclusive of the question. If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as prima facie evidence of an unconditional delivery to the vendee.

As between the consignor and the consignee, the bill of lading cannot be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction.

By the rules of the commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control such property, is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi*, may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may

have acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him.

The principle on which the title to goods may be transferred by a transfer of the bill of lading, is wholly distinct from that on which the right of stoppage *in transitu* rests. The right to stop goods in transit exists only where the vendor has consigned them to the buyer under circumstances which vest the title in the buyer. The transfer of goods by delivering the bill of lading, can be made only in cases where the vendor has not parted with the title.

In the case before us, it must be assumed that the court below, at general term, found from the evidence, that Mirrielees did not intend, by delivering the stearine to the carrier, to vest the title in Emery's Sons absolutely as purchasers, but only on condition that they would accept and pay the bills of exchange drawn on account thereof. It is true that this intention was not expressed on the face of the bills of lading, but it fully appears from other facts and circumstances. The letter of Mirrielees, of the date of each shipment, containing the invoice of the goods, and informing the consignees that the invoice had been valued (drawn against) that day; the drawing of the bills of exchange on account of the invoices and for their full value; the indorsement of the bills of exchange with bills of lading attached, and their delivery to Irving National Bank on discount, all on the day of shipment, clearly show the intention of Mirrielees at the time of shipment, to reserve the *jus disponendi*. And this conclusion is much strengthened by the further fact that previous transactions between the same parties had been conducted in the same way, without objection.

Upon this theory of the case, we are of opinion that Irving National Bank, by discounting the bills of exchange with the bills of lading attached, became vested of the property consigned to Emery's Sons, as a security for the payment of the drafts, as fully and completely as if the stearine itself had been delivered into its actual possession, and was entitled to demand from the consignees an account of the proceeds of sales or the price of the goods.

It is claimed, however, that these bills of lading were not transferable by delivery merely, for the reason that they were not made so negotiable by their terms. Bills of lading are not, and cannot be

made, by any form of words, negotiable in the sense that commercial paper payable to bearer, or order, or assigns, is negotiable. If such words of negotiability be contained in them, they only indicate the intention of the shipper as to the person for whose use the consignment is made. If the goods be deliverable, by the terms of the bill, to the consignee or his order, there can be no doubt that the person to whom the bill may be transferred by the consignor, would be charged with notice of the rights of the consignee, and on the other hand, if the bill be made to the use of the consignor or his order or his assigns, the consignee would be charged with notice of the rights of those to whom the bill may have been transferred. But in either case, the question is open to inquiry as to what such rights may be, and can be determined only by inquiry into the real nature and character of the transaction.

A bill of lading, being symbolical of the property described in it, like the property it represents, may be transferred by delivery merely, and this is so, without regard to the presence or absence of words of negotiability on its face. It is unlike commercial paper, however, in this—the assignee cannot acquire a better title to the property thus symbolically delivered, than his assignor had at the time of assignment.

It is also claimed that these bills of lading were not transferred to the bank until after the consignees had obtained possession of the goods, and a right had thereby accrued to them to hold the goods, or the price thereof, for the satisfaction of the claims due them from their consignor. This claim is based on the theory that the possession of the carrier was the possession of the consignees, and has already been answered. We do not understand it to be claimed that the goods were, in fact, delivered to the consignees by the carrier, before the transfer to the bank of the bills of lading. But if it were so claimed, we could not disturb the finding of the court below on that question. From the weight of the testimony, we think the bills of lading had been transferred to the bank before the goods arrived at the place of destination.

On petition in error by the plaintiff below, the Superior Court, sitting in general term, reversed the judgment rendered at special term in favor of the defendants, and remanded the cause to special term with instructions to the judge there sitting to render judgment for the plaintiff, which was done accordingly. In this we think there was error. The only question before the general term was as to

the alleged error of the court at special term in overruling the motion of the plaintiff for a new trial. When that error was found by the reviewing court the judgment below was properly reversed, and the only judgment which should have been rendered after reversal, was to grant a new trial as moved for at special term. The plaintiff not being entitled to judgment on the pleading, and there being no agreed statement of facts, or a special finding of facts by the court to which the case had been submitted on the evidence, it was not a case for final judgment. The order made at the general term will therefore be reversed. The judgment afterward entered in favor of the plaintiff is also reversed, and the cause remanded to the court below with instructions to grant the plaintiff below his motion for a new trial, and that it proceed to final judgment in the cause according to law.

Judgment reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. For what purpose was the bill of lading delivered to the Irving National Bank? What rights did the possession of the bill of lading give to the bank?
3. The bill of lading was issued for "Thomas Emery's Sons." Why did the court hold that no title passed to the consignee under the facts of this case?
4. Suppose that the court had been of the opinion that title had passed to the goods in question, what would have been the rights of the bank by virtue of its possession of the bill of lading?
5. S sells and ships goods to B. He takes out a bill of lading to the order of B and sends it forward to A, an agent, directing A not to deliver the bill of lading to B until he pays for the goods. B refuses to pay for the goods which are still in possession of the carrier. What are S's rights with respect to the goods?
6. S sells and ships a consignment of goods to B. He draws a draft on B for the purchase price, attaches to it a bill of lading indorsed in blank, and discounts it with the P Bank. The P Bank sends the draft forward to the X Bank for collection. B refuses to pay the draft. The goods are still in possession of the carrier. What are the rights of the P Bank with respect to the goods in question?
7. S ships goods to B and takes a bill of lading for them in his own name. He sends an order to the station agent at the place to which the goods are shipped, directing the agent to deliver the goods to B without demanding the production of the bill of lading. After the goods had

been delivered to B in pursuance of S's order, S drew a draft on B for the price of the goods, attached to it the bill of lading indorsed in blank, and discounted it with the P Bank. What are the rights of the P Bank with respect to the goods?

ALABAMA STATE BANK *v.* BARNES

82 Alabama Reports 607 (1886)

Clopton, J. The general rule, independent of statutory regulations, is conceded, that the delivery, without indorsement, of a warehouse receipt payable to bearer, as collateral security, passes the legal title, and vests possession of the property in the pledgee, equivalent to its actual and manual delivery. But it is insisted that the transfer of such receipts is regulated by the statutes, and that indorsement is requisite, not only to convey the title, but also to confer a special property, and to operate a constructive delivery of possession. Section 2099 of the Code provides: "All bonds, contracts, and writings for the payment of money, or other thing, or the performance of any act or duty, are assignable by indorsement, so as to authorize an action thereon by each successive indorsee." Under this section, as construed by our decisions, an indorsement of a warehouse receipt, though payable to bearer, is necessary to convey the legal title. *Allen* v. *Maury*, 66 Ala. 10. The section is enabling, and was specially designed to provide the mode, in respect to such documents, of passing the legal title, so as to enable the real owner to prosecute an action thereon in his own name. So far as it relates to the passing of title by the delivery of warehouse receipts and similar documents, the statute is an innovation on the merchantile law, and will not be construed as abrogating or modifying it, further than is expressed, or is absolutely required to effectuate the purpose.

By section 6 of the act of February 28, 1881, being the other statute relied on, warehouse receipts, given for cotton stored or deposited, may be transferred by indorsement; and any person, to whom the same may be transferred, shall be deemed and taken to be the owner of the property, so far as to give validity to any pledge, lien, or transfer, made or created by such person; and no cotton shall be delivered except on surrender and cancellation of the original receipt, or the indorsement thereon of the delivery, in case of a partial delivery. *Acts*, 1880–81, 133. This statute does not imperatively require indorsement. The intention is to protect the warehouseman

against a mistaken or wrongful delivery, and to protect the holder for value of such indorsed receipts, against latent equities and rights. The statute, being permissive, does not prevent the passing of title, and delivering possession in any mode previously effectual. *Rice* v. *Cutler*, 17 Wis. 351; Jones on *Pledges*, section 301. Notwithstanding section 2099 requires indorsement to convey the *legal* title, neither statute operates to prevent the transfer of a special property and constructive possession by the delivery of the receipt without indorsement, sufficient to create a valid pledge, as between the parties, and as to third persons not having acquired prior or intervening rights. *Fourth Nat. Bank* v. *St. Louis Cot. Comp. Co.*, 11 Mo. App. 333.

It may be regarded as now settled, that a warehouseman, having property of his own stored in his warehouse, may, in the absence of statutory enactments, issue receipts therefor, and pledge the property as collateral security for his own debt, by the delivery of such receipts. *Mer. & Man. Bank* v. *Hibbard*, 48 Mich. 118; *Cochran* v. *Ripley*, 13 Bush. 495; *Parshall* v. *Eggert*, 54 N.Y. 18. Section two of the act of February 28, 1881, is declaratory of the general rule. It provides that no warehouseman shall issue any receipt upon any goods, cotton, or other produce, to any person, as security for money loaned, or other indebtedness, unless such goods, cotton, or other produce is in his custody, and in store, or on the premises, and under his control, at the time of issuing such receipt.

QUESTIONS

1. What is a warehouse receipt? What is the usual form of a warehouse receipt?
2. What functions does a warehouse receipt perform? What qualities does it need to enable it to perform well its functions?
3. X delivers 100 bales of cotton to D for storage. D issues a written document to X in this form: "Received from X 100 bales of cotton, to be delivered on demand to X or order." X sells the cotton to P and delivers to him the warehouse receipt, without having indorsed it. D refuses to deliver the cotton to P on presentation of the receipt. P sues D in trover for conversion of the cotton. What decision?
4. In the foregoing case, the receipt states that the cotton is to be delivered to X or bearer. X sells the cotton to P and delivers him the receipt. D refuses to surrender possession of the cotton on presentation of the receipt. P sues D in trover. What decision?
5. In the foregoing case, X loses the receipt. T finds and sells it to B, a bona fide purchaser. B presents the receipt, receives possession of

the cotton, and sells it to E, a bona fide purchaser. What are the rights of X against D? against B? against E?

6. X is the holder of a warehouse receipt for 100 bales of cotton, deliverable to his order. He borrows $2,000 from the P Bank and delivers to it the warehouse receipt, indorsed in blank, by way of security. X defaults in the payment of the debt. What are the rights of the bank with respect to the cotton?
7. In the foregoing case, X delivers the warehouse receipt to the bank without having indorsed it. X defaults in the payment of his debt. What are the rights of the bank with respect to the cotton?
8. What is the effect of a warehouse receipt issued for goods owned and stored by the warehouseman?
9. What is the effect of a receipt issued for goods which the warehouseman does not have in his possession or under his control?
10. Examine the statues of some state in which you are interested and make a brief digest of the statutory provisions governing the use of warehouse receipts?

6. Contracts of Guaranty and Suretyship

a) The Nature and Scope of the Obligation

LA ROSE *v.* THE LOGANSPORT NATIONAL BANK

102 Indiana Reports 332 (1885)

MITCHELL, C. J. With respect to the distinction between a guarantor and surety, much nicety of refinement and some uncertainty will be found to exist, and the basis on which the distinction is made to rest is not always satisfactory. We think it may be said, however, that where the engagement is, that one who is liable in the first instance will pay a debt or perform an obligation, and that, upon his default, the promisor will answer for such default, the contract is one of guaranty. A concise definition of the term is: "A promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of some person, who, in the first instance, is liable for such payment or performance." Baylie's *Sureties and Guar.*, page 2; 3 Kent, *Com.* 121; *Gallagher* v. *Nichols*, 60 N.Y. 438; *Dole* v. *Young*, 24 Pick. 250; Colebrooke, *Col. Secur.*, page 329.

The engagement of a surety is, that in the event his principal fails, he will perform the original obligation, and whether it is entered into jointly with the principal or separately, the extent and character

of the obligation are the same as to both, depending only upon the form in which it is expressed. The contract of a guarantor, on the other hand, is that the principal is able, willing, and that he will perform an engagement which he has undertaken or is about to undertake, and that in the event of failure the guarantor will answer for the consequences. Whether the contract is entered into separately or jointly with the principal, if by its terms it appears that the principal is separately bound by an original independent contract, to which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform according to his original engagement, and that they will answer for his default in the event of failure, they become guarantors. The contract of the one is a direct original agreement with the obligee that the very thing contracted for shall be done. The other enters into a cumulative collateral engagement, by which he agrees that his principal is able to and will perform a contract which he has made, or is about to make, and that if he fails he will, upon being notified thereof, pay the resulting damages. *Ward* v. *Wilson*, 100 Ind. 52 (50 Am. R. 763); *Reigart* v. *White*, 52 Pa. St. 438; *Woods* v. *Sherman*, 71 Pa. St. 100.

QUESTIONS

1. It is said that suretyship embraces all forms of obligations by which one agrees to pay the debt or answer for the default of another. Mention as many forms of obligations as you can which fall under the relation of suretyship?
2. What is the difference between personal suretyship and real suretyship?
3. P promises C that he will pay a certain debt owed by C to D if D does not. C sues P on the promise. P sets up the following defenses: (*a*) That he is an infant. (*b*) That D is an infant. (*c*) That there was no consideration for his promise. Comment on the availability of each defense.
4. In the foregoing case, P sets up the following defenses: (*a*) That the debt between C and D is voidable because of fraud. (*b*) That he was induced by the fraud of D to make the promise. (*c*) That he was induced by the fraud of C to make the promise. Comment on the availability of each defense.
5. C sells goods to D. A few days later, P writes to C: "I understand you have sold goods to D. I will pay for them if he does not." C sues P on the promise. P contends that the promise is not binding because there was no consideration for it. What decision?

6. P writes to C: "Let D have $100 and I will see that you are repaid." C sues P on the promise. P contends that the promise is not binding because not supported by a consideration. What decision?
7. What is the difference between the undertaking of a guarantor and the undertaking of a surety?

MOORE *v.* HOLT

10 Grattan's Virginia Reports 284 (1853)

LEE, J. It is insisted that the appellee was not in fact a surety for Joseph Holt; that the letter of credit on the faith of which it was said the goods were furnished, was no guaranty but a mere letter of introduction or recommendation, upon which the appellee could not have been liable in a court of law; and at all events, that he could not have been made liable unless notice had been given him that his guaranty was accepted, and of the amount of goods furnished upon it.

A guaranty is a collateral engagement or undertaking to be responsible for the debt of another upon his failure to perform the engagement. The language used must express in a clear and explicit manner an intention on the part of the guarantor to make good the engagement of the principal in case of his default. *Russell* v. *Clark*, 7 Cranch. 69, 90, 91. But as a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction, but by what may be fairly presumed to have been the intention and understanding of the parties. *Douglas* v. *Reynolds*, 7 Peters' Reports 113.

In this case the appellee, a merchant doing business in the country, writes to a mercantile house in Richmond, with which he was in the habit of dealing, stating that his brother was going to Richmond to purchase goods, and as he was unacquainted there, the writer requests his correspondents to introduce him to some of the houses at which he (the writer) had dealt, "with assurance that any contract of his will and shall be promptly paid."

Now I think there could scarcely be a more unambiguous, clear, and explicit expression of intention on the part of the writer to assume the liability of a surety upon the default of the principal, and those to whom the letter might be shown could not understand it in any other sense. It is not at all like the letters in the case of *Russell* v. *Clark*, referred to by counsel. In those letters, as the chief justice states in delivering his opinion, while there were to be found expressions

alluding to that reciprocity of benefits which results from the intercourse of merchants with each other, there was no intimation of any intention on the part of the writers to become answerable for the parties introduced. They were simply letters of introduction and recommendation, such as are usual among merchants, manifesting the friendship of the writers for the parties introduced, and their solicitude that the party to whom they were addressed should aid their operations so far as his own view of his interests would induce him to engage in the transactions of a house of high character and having the particular good wishes of the writers.

I think the letter in this case might properly have been regarded by those to whom it was shown as the guaranty of the appellee for such sales as they might make to Joseph Holt upon the faith of it; and no question can be raised as to consideration, as it is well settled that it is not necessary there should be a consideration directly between the persons giving and receiving the guaranty. It is sufficient if the party for whom the guarantor becomes surety receives a benefit, or the party to whom the guaranty is given suffers a loss, for the surety to become the guarantor.

QUESTIONS

1. Must an offer of a guaranty be accepted? How must it be accepted? Is notice of its acceptance necessary?
2. Do you understand the court to be saying in this case that no consideration is necessary to support the guarantor's promise? Was there a consideration in this case for the promisor's promise?
3. Was the appellee in this case a surety or a guarantor for Joseph Holt? Does the language of the court make it clear which obligation the appellee is assuming? Does it make any practical difference in this case?
4. P writes to C: "The bearer hereof is a friend of mine and if you will sell him what he wants, I shall appreciate it very much." C sells goods to D and sues P on a promise of guaranty. What decision?
5. P writes to C: "This will introduce D. He is sound financially. You will confer a favor on me if you will sell him goods on credit." C sells goods to D and cannot collect the price of them from him. C sues P as guarantor of the debt. What decision?
6. P writes to C: "Please advance $500 to D. I think the loan will be perfectly safe." C advances the money, and being unable to collect it, sues P as a guarantor of the debt. What decision?
7. P owes C $500. He transfers a non-negotiable note of M to C in payment of the debt with the statement indorsed thereon: "This is a good note." C sues P as a guarantor of the payment of the note. What decision?

COWLES *v.* PECK

55 Connecticut Reports 251 (1887)

Loomis, J. This is a complaint to recover upon a guaranty in writing signed by the defendant on the back of a note given August 3, 1878, by one Robert Peck, and payable to the order of David M. Cowles, the plaintiff's testator, since deceased. A demurrer to the complaint, which was sustained in the court below, raises two questions for our consideration.

Was the guaranty an absolute or a conditional one? It was in these words: "I guarantee the within note good till paid."

The complaint is framed upon the assumption that it is an absolute guaranty of payment that required no action on the part of the payee or the plaintiff, while the demurrer on the other hand assumes that the guaranty is conditional and means that the note is capable of being collected by the use of ordinary diligence. We think the defendant's construction must be accepted as the true one.

All the authorities agree that there is a broad distinction between guaranties of payment and guaranties of collection. The former are an absolute unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter are an undertaking to pay if payment cannot by reasonable diligence be obtained from the principal debtor.

There is some disagreement in the authorities as to the precise steps to be taken by the holder of a conditional guaranty in order to subject the guarantor, but this distinction is of no importance in this case, inasmuch as the complaint, in affect, concedes that no steps whatever were taken to collect the note of the maker, and there is no averment that it was not a collectible note.

There has been no case before this court where the words of the guaranty were precisely like this. That of *Allen* v. *Rundle,* 50 Conn., 20, comes nearest to it; but there the words were "good and collectible," and they were construed as constituting a conditional guaranty. We do not think the addition of the word "collectible" controlled that case, for the words "good" and "collectible" are of similar import when used in such connection.

The plaintiff in support of this position cited *City Savings Bank* v. *Hopson et al.*, 53 Conn., 454, where the guaranty was in this form: "For value received we guarantee the within note until paid"; which was held to be a guaranty of payment. In view of this case

the plaintiff's counsel, with a suggestive play upon the words, asked: "How can the insertion of the word 'good' in a guaranty make it bad?" It cannot make it bad, but it may determine the class to which the guaranty belongs. Had the plaintiff used ordinary diligence in collecting the note of the maker or shown that it was not collectible, he could have recovered, provided of course there was a good consideration. The simple question is—what does the word "good" in such a connection import?

It seems to us unnatural to give it all the force that attaches to the word "payment," for the latter refers to the act of the debtor alone irrespective of any steps taken by the creditor, while the former word refers to and qualifies the note. The maker of a note may pay it when no one would have considered the note good, and on the other hand a note may be considered perfectly good which the maker would not pay till compelled to do so. The accepted test of the goodness of a note is its capability of being collected independent of any voluntary act of payment on the part of the maker, and the use of ordinary diligence on the part of the holder is implied where diligence would avail.

In *City Savings Bank* v. *Hopson*, *supra*, there was no word to limit the extent of the guaranty except the words "till paid." The court therefore considered the guaranty as belonging to the stronger class of absolute guaranties requiring actual payment, and the case was likened to that of *Breed* v. *Hillhouse*, 7 Conn. 523, where the word "payment" was used.

In Edwards on *Bills and Promissory Notes*, side page 235, it is said: "I warrant this note 'good' means that it is collectible, that the maker is responsible; it is not an engagement that the note will be promptly paid at maturity; and it is therefore incumbent on the holder of such note and guaranty, in order to charge the guarantor, to prove by legal evidence that the maker was not responsible." In 2 Daniel on *Negotiable Instruments*, section 1769, it is said: "The words 'I guarantee the collection of the within note and I promise that this note is good and collectible after due course of law,' and 'I warrant this note good,' are phrases of similar import, binding the guarantor only upon condition that the guaranty acts with due diligence in prosecuting the collection of the note." In *Hammond* v. *Chamberlain*, 26 Verm. 406, "I hereby guarantee this note good until January 1st, 1850," was held collateral and not an absolute undertaking, and that the contract meant that the makers of the note should be in that

condition that payment could be enforced against them if legal diligence was used for that purpose. In *Curtis* v. *Smallman*, 14 Wend., 231, a guaranty, "I warrant this note good," indorsed by the payee on the note, was held to be a guaranty that the note is collectible, and not that it will be paid on demand. In *Cooke* v. *Nathan*, 16 Barb., 342, it was held that a contract, "This note is good," meant that it could be collected by due course of law.

The conclusion already reached amply sustains the judgment of the court below. It is therefore unnecessary to consider the other question relative to the consideration, but as our silence might imply that we consider the question doubtful, we will say that it is essential to a valid contract of guaranty that there be a sufficient legal consideration, and as in this case, there is no consideration set forth and none appears on the face of the guaranty, and there is no averment that it was executed contemporaneously with the note, or that the latter was accepted on the faith of it, and as no other fact appears from which a consideration may be legally presumed, we think the demurrer upon this ground also was well taken.

There was no error in the judgment complained of.

QUESTIONS

1. What is the difference between an absolute guaranty of payment and a guaranty of collectibility?
2. What is the nature of P's liability on a promise of this kind: "I warrant this note good"?
3. P writes to C: "Let D have $500, and I will repay it provided you can't collect it from him." When the debt matured, C asks D for the money and D refuses to repay it. Thereupon C sues P on his promise. What decision?
4. C sues P on the following promise: "For value received I guarantee the within note until paid." By way of defense P contends that C took no steps to collect from D. What decision?
5. P, at D's request and for his accommodation, writes on a note "I guarantee this only in the second instance." C sues P on his promise. P contends that he is not liable because C took no steps to collect from D. P offers to show that D was insolvent when the debt matured. Is the evidence admissible?
6. P writes to C: "Sell $100 worth of goods to D and I will guarantee payment of the debt." C sues P on the promise, and P sets up two defenses: (*a*) That D is not in default. (*b*) Even if D is in default, that he, P, was never notified of it. What decision?

LOWRY *v.* ADAMS

22 Vermont Reports 160 (1850)

Assumpsit upon a written contract of guaranty. Plea, the general issue, and trial by jury, December Term, 1849, BENNETT, J., presiding.

Upon the facts, the court having intimated, that they should charge the jury, that the plaintiffs could not sustain an action upon the guaranty, the plaintiffs submitted to a verdict for the defendant, with liberty to except. Exceptions allowed.

POLAND, J. From the bill of exceptions and other papers referred to in this case the following facts appear to have been proved by the plaintiffs at the trial of this case in the county court. That E. N. Drury was the son-in-law of the defendant, and some time previous to September, 1846, had been in partnership with him in mercantile business in the city of Vergennes, and had purchased the defendant's interest in the partnership business and had succeeded him therein. That in the month of September, 1846, Drury, being about to go to the city of New York to purchase his usual supply of fall goods for his store in Vergennes, applied to the defendant for a letter of credit, to enable him to purchase said goods; and the defendant on the seventeenth day of September, 1846, gave to Drury a writing in these words, to wit: "Mr. E. N. Drury is buying goods in New York, and what he may want, more than he pays for himself, I will be responsible for. Vergennes, September 17, 1848. (Signed) Hiram Adams." That Drury carried said writing to the city of New York, and on the twenty-second day of September, 1846, presented the same to Stearns & Johnson and, upon the strength and credit of it, purchased of them a small bill of goods. That Drury left said paper in the possession of Stearns and Johnson, and at the same time told them, that he should buy goods of other persons in New York, and desired Stearns & Johnson to keep said paper in their possession and exhibit it to those who called on them to see it, and to hold it for the use and benefit of any person from whom he might purchase goods. That on the same day, or within a day or two after, Drury applied to the plaintiffs to sell him a bill of goods on credit, and at the same time informed them of said writing, and that he had deposited the same with Stearns & Johnson for the purposes above stated; and the plaintiffs thereupon sent their clerk to the store of Stearns & Johnson to see the writing and it was exhibited to the clerk by Stearns & Johnson, and a copy of it was taken by him and delivered to the

plaintiffs. That the plaintiffs, being satisfied of the sufficiency of said paper, sold and delivered to Drury a bill of goods amounting to the sum of $371.38, and took his note for the amount payable in four months from date (September 25, 1846) relying upon the said paper as their security for payment. That on the ninth day of November, 1846, the plaintiffs, upon the credit and faith of said paper sold and delivered to Drury another bill of goods, amounting to the sum of $81.00. That Drury returned with said goods to Vergennes, and continued to carry on his business there, as a merchant, until some time in the winter of 1847, when he failed and became insolvent, and the plaintiffs have never been paid for said goods.

The plaintiffs introduced evidence tending to prove that between the sixth day of December, 1846, and the second Tuesday of the same month, they gave notice to the defendant that they had sold and delivered the above-mentioned bills of goods to Drury, upon the faith of defendant's said guaranty, that the same were not paid for, and that they should look to the defendant for payment and also proved that they gave notice to the defendant on the twenty-fifth day of January, 1847, that Drury had not paid said note. The county court ruled, that the plaintiffs could not maintain their suit against the defendant upon said guaranty; whereupon the plaintiffs submitted to a verdict for the defendant, with leave to except to the ruling of the court; and the question is now before us upon the correctness of that decision.

The defendant insists that, although the writing signed by him was not addressed to any particular person, yet that, when it had been presented by Drury to Stearns & Johnson, and they had given Drury credit upon the faith of it, its object and purpose had become complete and executed, and that thereafter the paper was to have the same legal effect and consequences, as if it had been originally addressed to Stearns & Johnson by the defendant.

If the purpose of the parties were such that it might have been fulfilled by such use of the paper, or if the parties, at the time it was executed, might reasonably be supposed to have contemplated only a single purchase upon the credit of it, at some one particular house, this position of the defendant is doubtless correct. It becomes important then, to ascertain and determine, if possible, the true object and intent of the defendant in executing the paper and delivering it to Drury; for the law aims in all cases, if possible, to give effect to and carry out the real designs of the parties in every species of contracts; and in no one class of cases have the courts gone so

far for that purpose as in those of mercantile transactions and securities.

For the purpose of ascertaining the intent of the parties in entering into any contract, courts will look at the situation of the parties making it, the subject-matter of the contract, the motives of the parties in entering into it, and the object to be attained by it; and, even in cases where the contract is reduced to writing, will allow all these circumstances to be shown by parol evidence, if the intent of the parties upon the face of the contract is doubtful, or the language used by them will admit of more than one interpretation. See *French* v. *Carhart*, 1 Comst. 96, and observations of JEWETT, C. J., page 102; Chit. on *Cont.* 74, and notes. When, from the contract itself and all the surrounding circumstances, the true object and intent of the parties has been ascertained, courts will enforce the contract according to that intent, unless there be found in the way some stubborn inflexible rule of law, absolutely requiring a different determination. Considering the case in this view, what was the intention and understanding of the defendant, at the time he made and delivered the guaranty, or letter of credit, in question to Drury? Drury was going to New York to purchase his usual fall supply of goods for the business of a country store, where goods of every variety and description are usually kept for sale. The defendant had been a merchant himself, and had formerly carried on the mercantile business in the same store then occupied by Drury, and must have known that it would be impossible for Drury to have supplied himself with all the various kinds of goods usually kept for sale in a country store at a single house in New York, and that he must necessarily make purchases of goods at several different houses. The defendant, having been in business and known to be responsible, under this state of things gives to Drury a general letter of credit to carry to New York, addressed to no one to whom he agrees to be responsible for the goods Drury may purchase, more than he pays for. It would seem from the writing itself, and from the situation of the parties, impossible for anyone to doubt, what the defendant really intended, when he executed the paper and delivered it to Drury. We are fully satisfied what his object must have been, and that he intended to give to Drury the necessary credit to enable him to purchase his fall stock of goods, of the various descriptions and varieties kept in a country store, at as many different houses, and of as many different dealers, as might become necessary for that purpose.

Is there, then, any imperative rule of law in the way of giving effect to this intention of the parties, and which will prevent these plaintiffs, who sold goods to Drury upon the credit and faith of the defendant's letter, from holding the defendant liable, because another firm had previously trusted Drury with a bill of goods upon the credit of the same letter? No case has been shown us, and the counsel for the defendant admits that after a laborious search he has not been able to find any decided case, or statement by any elementary writer that, upon a general letter of credit, like the present one, the signer could only be liable to the person who gave the first credit upon it. In the case of *McClung et al.* v. *Means*, 4 Ham. Ohio R. 193, the supreme court of Ohio seems to have held that, upon a guaranty very similar to the present, different persons might give credit upon the faith of it; though judgment in that case was given for the defendant upon another point. We do not find that this precise point has been adjudged by the courts, either in England or in this country; but in many cases we find dicta fully warranting the sustaining of such an action. See *McLaren* v. *Watson's Ex'r.*, 26 Wend., 436, 437, by Verplanck, Senator; *Burckhard* v. *Brown*, 5 Hill, 642. See also opinion of Judge Story, in note to Story on *Bills*, 545 to 555; Story on *Cont.*, 737, and cases cited in notes; Smith's *Merc. Law*, 448, and Am. editor's note; *Lawrason* v. *Mason*, 3 Cranch. 492; *Bradley* v. *Cary*, 3 Greenl., 233. Without taking farther space upon the question, we are not able to discover any principle, or authority, by which we are precluded from giving to the defendant's letter of credit the effect we are satisfied he intended—that is, to make himself responsible to each and every person, who should sell goods to Drury, relying upon the faith and credit of it, and that he became liable to each in the same manner, and to the same legal effect and extent, as if he had given a separate letter to each.

The judgment of the county court is therefore reversed and a new trial ordered.

QUESTIONS

1. P gives D a letter of credit, identical in form with the one in the principal case, and directs him not to buy from anyone but C. D, however, exhibits the instrument to B, who extends credit to D in reliance on it. What are B's rights against P?
2. P writes to C: "Sell what goods D desires to purchase and I will see that you are paid." B in reliance on the promise sells goods to D. What are B's rights against P?

3. In the foregoing case, C delivers the guaranty to B who sells goods to D in reliance upon it. What are B's rights against P?
4. P gives to C the following instrument: "To whom it may concern: I will personally stand good for all D's debts." C delivers the instrument to B, who advances money in reliance upon it. B sues P on the written promise. What decision?
5. P writes to C: "Advance $500 to D and I will guarantee its repayment." C advances the money and notifies P of the fact. C assigns his claim against D to B. B sues P on his written promise to guarantee the debt. What decision?
6. P gives a written promise of guaranty to C in favor of D. C extends credit on the promise to D and X jointly. What are C's rights against P?
7. P gives a written promise of guaranty to C in favor of D and X jointly. C extends credit on the promise to D. What are C's rights against P?

WHITE'S BANK *v.* MYLES

73 New York Reports 335 (1878)

Appeal from judgment of the General Term of the Superior Court of the city of Buffalo, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

Earl, J. This is a suit to recover of the defendant the amount of six drafts drawn by one Franklin D. Cummer, and discounted for him by the plaintiff. The suit is founded upon the following letter of credit:

"Toronto, 27th March, 1871.

"F. Gridley, Esq., Cashier White's Bank of Buffalo:

"Dear Sir: Please discount for Mr. Cummer to the extent of $4,000. He will give you customer's paper as collateral. You can also consider me responsible to the bank for the same.

Yours truly,
"W. Myles."

The plaintiff recovered, and the defendant seeks to reverse the judgment upon several grounds, which I will briefly notice. The letter is somewhat ambiguous upon its face. Without some other light than that obtained from a simple perusal of the letter, it is impossible to say with certainty whether it was intended as a guaranty

for a single credit to the extent of $4,000, or as a continuing guaranty to that extent. In such a case a resort may be had to the surrounding circumstances, the nature of the business in which the credit was to be used, the situation and relation of all the parties and their previous dealings, and the negotiations which led to the giving of the letter, to enable the court to ascertain what was meant by the letter. The terms of the letter cannot be changed by such evidence, and no additional language can be imported into it. But the evidence is proper to enable the court to understand the meaning of the language used. (*Bridger* v. *Pierson*, 45 N.Y., 601; *Field* v. *Munson*, 47 *idem*, 223; *Page* v. *McDonnell*, 55 *idem*, 299; *Knapp* v. *Warner*, 57 *idem*, 668; *Heffield* v. *Meadows*, 4 C. P. Law Rep., 595.) A case very much in point is that of *Heffield* v. *Meadows*. In that case the letter of credit was as follows: "I, John Meadows, will be answerable for fifty pounds sterling, that William York, of Stamford, butcher, may buy of Mr. John Heffield. John Meadows."

That seems as clearly to be a guaranty for a single sum as the one in this case. But the court held that upon the face of the paper there was ambiguity which justified a resort to the surrounding circumstances to ascertain what was meant. Among other things, the plaintiff was allowed to prove the negotiation and conversation which led to the giving of the paper. WILLES, J., said: "The question in this case is whether the guaranty declared on was a continuing guaranty for fifty pounds, so as to be a security to the plaintiff to that extent for any balance which might become due to him in the course of his dealings with York, or whether the security was limited to a single transaction between the plaintiff and York. It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee. Having done this it will be proper to turn to the language of the guaranty, to see if that language is capable of being construed so as to carry into effect that which appears to have been the real intention of both parties." And the court held it to be a continuing guaranty.

Now what facts have we here to enable us to construe this instrument? The letter was addressed to the cashier of a bank requesting him to discount for Mr. Cummer to the extent of $4,000, and promising to be responsible for the same. This would be quite an unusual instrument to give to a bank for a discount of a single sum or up to a single limit. If such had been the intention, the more obvious method would have been for the defendant to have secured the paper to be discounted by placing his name thereon. Cummer was carrying on a continuous business in Buffalo and was doing his banking business with the plaintiff. He needed, in his business, discounts from time to time, and was not a man of pecuniary responsibility. The defendant was his father-in-law, residing in Canada, and desired to aid him. He was so situated that he could not be present at all times to indorse his paper. Cummer had a line of discounts with plaintiff from $1,000 to $6,000 and desired to continue it. Plaintiff wanted more security and defendant went with Cummer to plaintiff, and there, knowing the relations between the plaintiff and Cummer, and the mode in which they conducted their business, expressed a willingness to aid Cummer, and agreed to give this paper. It is clear that what Cummer needed, and what defendant wanted him to have, was a continuous credit at the bank to the extent of $4,000. A single credit or a credit limited to that amount would have been but little service to him. Without more he could not have continued his business. Viewed in the light of all these circumstances, which were undisputed, we must conclude that the letter was intended as a continuing guaranty, and the court could properly have held so as matter of law.

Precedents do not help much in the construction of such instruments. The dividing line between those which are limited and those which are continuous is not always plainly seen, and cases apparently quite similar are sometimes found upon one side of it, and sometimes upon the other. Where there is uncertainty upon the face of the instrument, its construction must necessarily depend upon the circumstances which throw light upon it, and hence the diversity. In *Gates* v. *McKee* (13 N.Y. 232) the following instrument, signed by the defendant, was held a continuing guaranty: "Mr. Gates, Sir—I will be responsible for what stock M.E. McKee has had or may want hereafter to the amount of $500." And it was there said that these instruments are to be liberally interpreted so as to protect persons who give credit on the faith of them. In *Bastow* v. *Bennett* (3 Camp.

220), there was the following instrument: "I hereby undertake and engage to be answerable to the extent of £300 for any tallow or soap supplied by Mr. Bastow to France & Bennett, provided they shall neglect to pay in due time." In *Hargreave* v. *Smee* (6 Bingham, 244) the following: "I do hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to J. & E.A.S., according to the custom of their trading with you, in the sum of £100." In *Mason* v. *Pritchard* (12 East, 227) there was a guaranty by the defendant to the plaintiff "for any goods he hath or may supply W.P. with to the amount of £1,000." In *Merle* v. *Wells* (2 Camp. 413) the guaranty was "for any debt W.W. may contract with the defendant in his business as a jeweler not exceeding £100"; and these instruments were all held to be continuing guaranties. It cannot, therefore, be said that we run counter to the precedents in holding the letter now before us to be a continuing guaranty.

The judgment, therefore, is right and must be affirmed, with costs.

QUESTIONS

1. What was the issue under consideration in this case? How was the issue decided? What rule of law can be deduced from the decision?
2. P writes to C: "I will be responsible for what stock D has had or may hereafter want to the amount of $500." What possible constructions may be placed on this undertaking?
3. On December 20, 1921, P wrote to C: "I will be responsible for any amount of money which you may advance D, not to exceed $1,500." On January 1, 1922, C advanced D $1,200, and on February 1, $800. On April 1, D paid C $1,600 on account. On May 1, C made a further advance to D of $1,000. In June, D became insolvent, without having paid any more on account of his indebtedness to C. What are C's rights against P?
4. P writes to C: "If you will let D have what money he wants and charge the same to my account, I will see that you get your pay." On nine or ten occasions, covering a period of two years, C advanced in all $15,000 to D. C sues P on his promise for the whole amount. What decision?
5. When there is doubt as to whether a given promise is a single or continuing guaranty, how is the question determined?
6 Draw up a letter of credit which is clearly a continuing guaranty; which is clearly a single or limited guaranty.

MAYS *v.* JOSEPH

34 Ohio State Reports 22 (1877)

The plaintiff in error, having recovered a judgment before a justice of the peace against one Corns, caused an execution to be issued thereon and delivered to the defendant in error, as constable for service. There was found, in the possession of the judgment debtor, a yoke of oxen, which he claimed was exempt from levy and sale. Whereupon, the defendant in error refused to sieze the oxen, under the writ of execution, unless the plaintiff in error would indemnify him from loss and damage in so doing.

Thereupon, the plaintiff in error requested and directed the defendant to levy upon and sell the oxen, and promised to save him and his sureties harmless in the premises. The defendant in error, relying upon this promise of indemnity, seized and sold the oxen, and applied the proceeds to the satisfaction of the judgment. Afterward, the execution debtor recovered a judgment against the defendant in error, for the wrongful seizure and sale of the oxen under said writ.

The original action was brought by Joseph, the constable, against Mays, the plaintiff in execution, on said verbal promise of indemnity, and judgment was recovered thereon in the court of common pleas. The judgment was affirmed by the district court. By this proceeding, it is sought to reverse these judgments, upon the ground that it is void under the statute of frauds and perjuries, as a promise to answer for the debt, default, or miscarriage of another person.

By The Court. That the promise of indemnity sued on was not invalid as being against public policy, was settled in *Miller* v. *Rhoades*, 20 Ohio St. 494, and cases therein cited. The promise was an original and not a collateral engagement. There was no element of debt default, or miscarriage of any third person in the agreement. The act against which the indemnity was promised was for the benefit of the promisor, and involved a liability to loss on the promisee, and was not within the statute of frauds. *Green* v. *Cresswell*, 10 Adolphus and Ellis, 453; *Weld* v. *Nichols*, 17 Pick. 538; *Adams* v. *Dansey*, 6 Bing. 506; *Goodspeed* v. *Fuller*, 46 Maine, 141; *Marcy* v. *Crawford*, 16 Conn. 549; *Allaine* v. *Ouland*, 2 John. Cases, 52; Browne on *Statute of Frauds*, chap. 10, page 144 *et seq.*

Motion overruled.

QUESTIONS

1. The statute of frauds provides: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the *debt*, *default*, or *miscarriage* of another person, unless the agreement upon which action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." Was the promise of defendant in this case within the statute? Why or why not? What was the nature of the promise in the principal case?
2. D is liable to C on a note. P, for a consideration, promises D that he will pay the note to C. D sues P for failure to pay the note. P says the action cannot be maintained because his promise was not in writing. What decision?
3. In the foregoing case, C sues P on the promise. P says, (*a*) that his promise is oral and therefore not enforcible and (*b*) that, in any event, he never made any promise to C. What decision?
4. D owes C $100. P enters into an agreement with D to pay C. P then enters into a contract with C to pay it. C sues P on his promise. P contends that his promise is unenforcible because it was given orally. What decision?
5. D conveyed property to P to pay D's creditors. C sues P for $500 which D owed him. P pleads the statute of frauds. What decision?
6. P without authority orders goods from C stating that they are for D, but that he will pay for them if D does not. D refuses to accept the goods. C sues P on his promise. P pleads the statute. What decision?
7. P promises C to execute a guaranty of D's debt to C. H refuses to do so and C sues him on his oral promise. P pleads the statute. What decision?
8. P, for a consideration, orally promises C that he will stand responsible for any loss which C may sustain by extending credit to D. C extends credit to D and sustains a loss, and sues P on his promise. P pleads the statute of frauds. What decision?

SMITH BROS. *v.* MILLER

152 Alabama Reports 485 (1907)

TYSON, C. J. This action was brought to recover $78.80 due by account, resulting in a judgment for defendant. Defendant claimed credit for a bale of cotton which the testimony tends to show was delivered by him to the wife of one of the plaintiffs at their home;

and it also tended to show that this bale was received by the plaintiffs. Against plaintiffs' objection the receipt given by the wife for the cotton was admitted in evidence. There was no error in this ruling.

Among the items in the account sued on were two for goods sold and delivered to one Aldredge and one Miller, a brother of the defendant. Some of the testimony tended to show that the credit for these goods was extended to defendant alone. Other testimony tended to show that the credit was given to Aldredge and Miller, and that the defendant agreed to see it paid. Again, other testimony tended to show that, while the credit for the goods was given to Aldredge and Miller, the plaintiffs by agreement with defendant released Aldredge and Miller from their liability, upon the consideration of his (defendant's) promise to pay for the goods. On this aspect of the case the court charged the jury that "if the goods were sold to Aldredge and Miller, and if credit was extended to them, then there could be no recovery therefor against the defendant, unless he agreed in writing to see it paid." To this the plaintiffs excepted. The exception was well taken. If the credit was given defendant, notwithstanding the goods were delivered to Aldredge and Miller, his promise or undertaking to pay for them was original, and not within the statute of frauds, and was not required to be in writing. *Pake* v. *Wilson*, 127 Ala. 242, 28 South, 665, and cases there cited.

Again if Aldredge and Miller were entirely released or discharged, and the obligation or promise of defendant was substituted for theirs, the statute of frauds has no application. The new debt thus created is binding on the substituted promisor, the defendant. "It is his own debt, and can no longer be said to be the debt of another." *Thornton* v. *Guice*, 73 Ala. 321, and cases there cited; *Carlisle* v. *Campbell*, 76 Ala. 246.

For the error pointed out, the judgment is reversed, and the cause remanded.

QUESTIONS

1. Suppose that it is shown in the second trial of this case that the goods were sold to Aldredge and Miller and that the defendant orally agreed to see that the goods were paid for, what should be the decision of the court?
2. Suppose that it appears that the defendant said, "You sell and deliver the goods to Aldredge and Miller and I will pay for them," what should be the decision of the court?

3. Suppose that it appears that the goods were sold to Aldredge and Miller but that the defendant orally promised to pay plaintiff for them in consideration of the plaintiffs' releasing Aldredge and Miller, what should be the decision of the court?
4. P says to C: "If you will not sue D on your claim against him for thirty days I will guarantee its payment." C forbears for thirty days and brings an action against P. P pleads the statute. What decision?
5. P says to C: "Sell D $500 worth of goods, and I will pay for them." C sues P on this promise. P pleads the statute of frauds. What decision?
6. In the foregoing case C sues D. D pleads non-assumpsit. What decision?
7. In case No. 5, P pays for the goods. Does he have any rights against D?
8. P says to C: "Sell goods to D, and I will pay for them or see that they are paid for." C sells and delivers the goods to D and charges them to his account. D refusing to pay for them, C sues P, who pleads the statute. What decision?
9. In the foregoing case, C charges them to P, but presents a bill for the goods to D. What decision in an action by C against P?
10. Suppose C charges the goods to P and later presents a bill to him, is this conclusive that P is the primary and original debtor?
11. D asks P if he will assist him in getting goods from C. P and D call on C and D selects the goods he desires. P says: "We will pay for these goods soon." C sues P for the price of the goods. What decision?
12. Suppose in the foregoing case that P is compelled to pay for the goods, does he have any recourse against D?
13. C extends credit to P and D jointly. Does C's knowledge that P is acting for the accommodation of D affect his rights against P?

RAABE *v.* SQUIER

148 New York Reports 81 (1895)

Appeal from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made October 17, 1893, which affirmed a judgment in favor of defendants entered upon the report of a referee dismissing the complaint.

HAIGHT, J. This action was brought to recover the sum of $2,800, the balance claimed to be due on contracts between the defendants Squier and Whipple and the plaintiffs, in which the plaintiffs undertook to furnish the woodwork for ten houses which the defend-

ants Squier and Whipple were building on West End avenue in the city of New York, which were owned by the defendants Jencks and Stokes.

The complaint alleges that the defendants Jencks and Stokes "promised and agreed with the plaintiffs to be answerable to the said plaintiffs for the payments to be made under the contracts aforesaid, and guaranteed the payments therein mentioned in consideration of the plaintiffs fulfilling and completing the contracts aforesaid, and promised and agreed to pay the plaintiffs for all the work, labor, and services and material furnished under the aforesaid contracts if the said Squier and Whipple would not pay."

The facts as disclosed by the evidence are substantially as follows: Jencks and Stokes were the owners of the premises. Squier and Whipple were building the houses thereon for them. Squier and Whipple entered into a contract with the plaintiffs to furnish the woodwork for the houses for the sum of $20,000. The payments were to be made in instalments in cash, less 10 per cent discount, on the delivery of the material at the buildings. The contract specifically designated the material to be delivered upon each instalment. The plaintiffs prepared the first instalment of material, and delivered the same at the buildings, and then called upon the defendants, Squier and Whipple, for the first payment due them under the contract, but the same was delayed and not made for the space of about three months. The plaintiffs prepared and delivered the second instalment of material, and also demanded payment for that, which was neglected and delayed. The plaintiffs then prepared the rest of the material called for by the contract, but refused to deliver the same until the instalments furnished by them had been paid for. Under these circumstances the defendants Jencks and Stokes saw the plaintiffs and told them that they were owners of the buildings; that they wanted them finished and that if the plaintiffs would go ahead and deliver the rest of the material they would see them paid therefor; that if Squier and Whipple did not pay they would take it out of the amount going to them and would pay the plaintiffs. It further appears that, relying upon this promise, the plaintiffs proceeded and delivered all the material called for by the contracts, but the sum of $2,800 still remains due to them and unpaid.

The referee dismissed the complaint as to Jencks and Stokes upon the ground, as he says, that their promise to pay being oral was void under the statute of frauds.

As to the statute of frauds it appears to us that its provisions have no application to the case under consideration. In the first place the indebtedness at the time the promise was made has been paid. The promise, in so far as it is here thought to be enforced, related to the indebtedness thereafter to be created. The promisors were the owners of the buildings in process of construction. The woodwork furnished by the plaintiffs was for their benefit. The contractors had neglected to pay the plaintiffs for the material furnished and they refused to deliver more, as they had the right to do. Under such circumstances the promise was made, and it was in reliance upon the promise that the plaintiffs delivered the rest of the woodwork. The promise thus made was original and founded upon a new consideration, that of the goods. It was beneficial, as we have seen, to the promisors, thus bringing the case within the rule stated by FINCH, J., in *White* v. *Rintoul* (108 N.Y. 222, 227), in which he says: "Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." (*Ackley* v. *Parmenter*, 98 N.Y. 425; *Prime* v. *Koehler*, 77 N.Y. 91; *Bayles* v. *Wallace*, 56 Hun 428.)

The judgment should be reversed and a new trial granted, costs to abide the event.

QUESTIONS

1. The promise of the defendants to the plaintiff was orally made. Why was it enforced against them? Was it not collateral promise to answer for the debt of another?
2. What was the consideration for the defendants' promise in this case?
3. D owes C $500. In consideration of $25 paid by C to P, P promises that he will pay the debt if D does not. D does not pay the debt. C sues P on the promise. P pleads the statute of frauds. What decision?
4. C sells goods to P. P gives a note of D in payment for the goods and orally guarantees its payment. C sues P on the promise. P pleads the statute. What decision?
5. D transfers property to P who orally agrees to pay C, a creditor of D, the purchase price of the goods. C sues P on the promise. P pleads the statute. What decision?
6. P has in his possession property which belongs to D. P enters into a contract with C to pay the latter a debt to C out of this property. C sues P on the promise. P pleads the statute. What decision?

b) Defenses of Surety and Guarantor

BISHOP *v.* EATON

161 Massachusetts Reports 496 (1894)

Contract on a guaranty. The judge ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.

Knowlton, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent contract or a guaranty. The judge found that the plaintiff signed the note relying upon the letter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative and assist him to get money from someone else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, might look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other person as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion, that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law, applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the

act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. *Babcock* v. *Bryant*, 12 Pick. 133; *Whiting* v. *Stacy*, 15 Gray, 270; *Schlessinger* v. *Dickinson*, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done. How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defense that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in *Vinal* v. *Richardson*, 13 Allen, 521, after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. *Chace* v. *Brooks*, 5 Cush. 43; *Carkin* v. *Savory*, 14 Gray, 528. The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

Exceptions sustained.

QUESTIONS

1. What was the nature of the offer which the defendant made to the plaintiff in this case? What kind of acceptance was contemplated by it? When was the contract made?
2. Suppose that the plaintiff had sent no notice at all to the defendant, what would have been the conclusion of the court as to the liability of the defendant?

3. Suppose that all three parties had lived in the same town and that the plaintiff had sent no notice to the defendant, what would have been the decision of the court?
4. C offers to sell goods on credit to D in consideration of P's promise to guarantee payment of them. P sends C a written acceptance of the offer. C sells $1,200 worth of goods to D, and sues P on his promise. P contends that he is not liable because he was not notified of the sales to D. What decision?
5. P, in consideration of $1, promises C to guarantee the repayment of any advance which C may make to D. C advances $500 to D. C sues P on his promise. P pleads that he was given no notice of the advance. What decision?
6. P writes to C: "If you will promise to advance money to D, I will see that you are paid." C advances $500 to D, but gives no notice to P of his intention to advance the money or of the advance. C sues P on his promise. What decision?
7. P and D write to C for goods, jointly promising to pay for them, although to C's knowledge the goods are for D. C ships goods to D and sues P for the price of them. P pleads that he was given no notice of the acceptance of their offer. What decision?

HUNGERFORD *v.* O'BRIEN

37 Minnesota Reports 306 (1887)

Dickinson, J. The defendant Sawbridge made his negotiable promissory note, which was indorsed to one Gage, who indorsed it in blank to the defendant O'Brien, and he, before maturity, transferred it for value to the plaintiff, indorsing upon the note and signing this guaranty: "For value I hereby guarantee the payment of the within note to Cassie Hungerford or bearer." The note was not paid. Nothing was done by the plaintiff at the maturity of the note to fix the liability of the indorser Gage. The defendant O'Brien had no notice of the non-payment of the note until more than a year after its maturity. Upon the trial of the issue raised by the answer of the defendant O'Brien, evidence was presented tending to show that the maker of the note was solvent at the time of its maturity, but has since become insolvent; and that the indorser, Gage, was also solvent. The court directed a verdict for the plaintiff.

The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expressed the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of

"the payment of the within note" imported an undertaking, without condition, that, in the event of the note not being paid according to its terms, that is, at maturity, the guarantor should be responsible. The non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid, and the time when payment should be made—all of which was known to the guarantor, and appears upon the face of the contract. The liability of the guarantor thus becoming absolute by the non-payment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-payment have such effect.

It follows that the fact that the maker had become insolvent since maturity, or that a mortgage security had become impaired by depreciation in the value of the property, was no defense; nor was it a defense that the guarantor was not notified of the non-payment of the note. We are aware that the position here taken is opposed by some decisions. No valid agreement was shown between the maker and the plaintiff extending the time of payment. From the position above taken, it logically follows that the neglect of the guarantee to take the steps necessary to fix the liability of the indorser, Gage, did not discharge the guarantor. The latter, by his unqualified guaranty of the payment of the note, took it upon himself to see that the note was paid, and was therefore not entitled to notice of its non-payment. For the same reason, the plaintiff did not owe to the guarantor the duty of taking the steps necessary to fix the contingent liability of the indorser by demand and notice of dishonor. *Philbrooks* v. *McEwen*, 29 Ind. 347; *Lang* v. *Brevard*, 3 Strob. Eq. (So. Car.) 59; *Pickens* v. *Finney*, 12 Smedes & M. 468; 2 Lead. Cas. Eq., notes to *Rees* v. *Berrington*. No such obligation is involved in this contract of guaranty. Even in the case of an ordinary indorsement, the holder, at maturity, is under no obligation to his indorser to give notice of dishonor to prior indorsers or parties. The last indorser becomes liable when he alone is notified, and he in turn may fix the liability of prior parties by giving notice to them.

Order affirmed.

QUESTIONS

1. At C's request, P guarantees the debt of D. Is C under a duty to proceed in the first instance against D to enforce his claim?
2. P becomes jointly liable with D for a debt, but for the accommodation of D. Must C proceed against D before he can resort to P?
3. P and D jointly promise to pay $500 to C. C knows that as between P and D, D should pay the debt. He demands payment of D who refuses to pay. Three months later, D becomes insolvent. Four months later, C sues P for the amount of the debt. P pleads that he was not notified of D's default. What decision?
4. P guarantees the payment of D's debt to C. When the debt matures, D refuses to pay. Later, D becomes insolvent. C sues P on his promise. P pleads that he was not given notice of D's default. What decision?
5. P stipulates in his contract of guaranty that he shall be notified of D's default. What is the effect of such a stipulation?
6. D draws a note to the order of X. X indorses it to P, who indorses it to H. H presents the note at maturity and M refuses to pay it. H brings an action against P on his indorsement. What decision?
7. P guarantees the collectibility of D's debt to C. At maturity, C finds that D is insolvent and does nothing. Later, he brings an action against P on his promise. What decision?
8. P guarantees to C a debt of D, payable on demand. C demands the payment of the debt and D refuses to pay it. A month later, C sues P on his promise. What decision?
9. P writes to C: "Advance money to D as he needs it, and I will guarantee its repayment." During the year, C advanced money in varying sums to D, to be repaid in each instance within thirty days. At the beginning of the second year, C advanced $1,500 to D for sixty days. D failed to repay this at the end of sixty days. Ten days later he becomes bankrupt, but for ninety days previous to this time he had been insolvent. C sues P on his promise. P pleads that he is discharged because he was not seasonably notified of D's default. What decision?

PUTNAM *v.* SCHUYLER

4 Hun's New York Reports 166 (1875)

Appeal from a judgment entered on the decision of the court. The action was brought to recover upon two promissory notes made by Katherine S. Henriques and guaranteed by the defendant. Judgment for the plaintiff.

LEARNED, P. J. Mrs. Henriques, in her lifetime, made two notes to Dr. Allen, the plaintiff's testator. After her death the defendant

guaranteed them, by writing under each as follows: "For value received I hereby guarantee the payment of the above note. L. W. Schuyler." On the trial the defendant offered to prove that Dr. Allen was the medical attendant of Mrs. Henriques; was in the habit of advising her as to financial and other matters; that she reposed confidence in him in relation to her affairs; together with certain other matters tending to show that the notes were obtained by fraud, and that they were without consideration. The evidence was objected to on the ground that, by executing the guaranty, the defendant had admitted the notes, and was estopped; that the defense of fraud was personal to Mrs. Henriques and her representatives; that the defendant could not impeach the settlement between maker and payee. The evidence was excluded, and the defendant excepted.

I assume, from the manner in which the case is presented, that it was not really claimed on the trial that these matters would not have been competent in behalf of the representatives of Mrs. Henriques. Their exclusion was on the ground that they were not competent in behalf of the guarantor. On this subject, of the right of a guarantor to set up defenses which would undoubtedly be valid in favor of the principal, there is an apparent conflict. But a little discrimination will show that the conflict is only apparent.

First. There is a class of cases in which the owner of a note or bond has assigned it, with a guaranty. In these, it has been held that the guarantor could not show that the instrument was invalid. It would be unjust to permit him to assign an invalid instrument; to guarantee its payment or collection; to receive the value, and then, when sued on his guaranty, to assert that the original instrument was invalid. He is estopped. The case of *Mann* v. *Eckford's Executors*, 15 Wend., 502, is of this character. The Life and Fire Company, of which Eckford was president, assigned to the Western Insurance Company a bond and mortgage. Eckford guaranteed the bond and mortgage, and the money paid for it, expressing the amount. The defendants, his executors, were not allowed to set up usury in the bond and mortgage, against the plaintiff, the receiver of the Insurance Company.

Second. The guarantor is held liable in those cases in which the debt is justly owing, although, from some defect or incapacity, the principal is not liable in an action. Thus, where the makers of a note were married women, incapable (then) of making a note, the accommodation indorser was still held liable. *Erwin* v. *Downs*,

15 N.Y. 576; see *Kimball* v. *Newell*, 7 Hill, 116. The guarantor of a lease is liable, although only one of the two lessees executed the lease. *McLaughon* v. *McGovern*, 34 Barb. 208. In that case, Judge Bacon speaks of this class of cases, mentioning among others, the guaranty of goods sold to an infant. So the guarantor of a note purporting to be made by two, where the signature of one is unauthorized, is liable. *Sterns* v. *Marks*, 35 Barb. 565. In all these cases the debt is justly owing to the plaintiff; and through no fault of his, he is unable to recover against the principal, or one of the principals.

Third. A guarantor cannot set up, by way of set-off, a claim distinct from that on which he is sued. The right of set-off (that is as distinguished from a defense arising upon the claim itself) belongs only to the principal debtor, and can be used only at his option. Such is the doctrine of *Gillespie* v. *Torrance*, 25 N.Y. 306, and this is all which that case decides on this point. By indirection, however, it implies that a defense to the claim (as distinguished from a set-off) is available to the guarantor. To the same effect is *Lewis* v. *McMillen*, 41 Barb. 420.

Fourth. But there are still other cases which are not embraced within either of these preceding classes: cases where the plaintiff is the original party to the contract, and therefore has not received it by assignment from the guarantor; where the proposed defense is not the incompetency of the principal to contract; and where it arises out of the contract itself, and not by way of set-off. In these the guarantor has been permitted to make the defense.

He has thus, as to the original contract, been allowed to set up usury. *Morse* v. *Hovey*, 9 Paige, 197; *Parshall* v. *Lamoureaux*, 37 Barb. 189; duress of his principal, *Osborn* v. *Robbins*, 36 N.Y. 365; *Strong* v. *Grannis*, 26 Barb. 122; partial failure of consideration, *Sawyer* v. *Chambers*, 43 Barb. 622. And I find no case which intimates that when a person has obtained an obligation from a principal by fraud, he can wipe out the fraud by obtaining a surety to the obligation. Assuming that, in justice and equity, the obligee, by reason of fraudulent acts on his part, has either no claim, or a less claim, against the principal, I see no reason why he should stand in a better position against the guarantor.

The defendant offered to prove acts of the plaintiff's testator tending to show that he obtained the notes improperly from the maker; that he took advantage of her confidence in him, and that she did not owe him. If these facts be true, he ought neither to recover

of her representatives on the notes, nor of the defendant on her guaranties.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

QUESTIONS

1. D gratuitously promises to pay C $500. P writes: "I will guarantee the payment of the $500." This is an action by C against P on the latter's promise. What decision?
2. Suppose in the foregoing case that C had given P $5 as a consideration for his written guaranty, would your conclusion be the same?
3. P guarantees the debt of D, an infant, to C. When C attempts to collect from D, the latter chooses to avoid his promise. C sues P. P contends that he is not liable because he did not know that D was a minor. What decision?
4. P for a consideration guarantees D's debt to C. In an action by C against P, the latter pleads that D's debt was procured by fraud on the part of C. What decision?
5. P contracts to guarantee a promise of D which C secured by fraud. C attempts to collect from D and D rescinds the contract because of fraud. Can C collect from P?
6. C sells goods to D on credit, payment for which P guarantees. In an action by C against P, P contends that he should be permitted a set-off of $100 which D might have had against C. What decision?
7. P guarantees payment by D for goods sold to him by C. In an action by C against P, P wishes to set off against the amount sued for, damages arising from a breach of warranty which would have been available to D in an action by C against D for the purchase price of the goods. What decision?
8. D and C enter into a written contract by which C agrees to convey Blackacre to D and D agrees to pay $10,000 for it. P, for a consideration, promises in writing to guarantee D's promise to pay. This is an action by C against P on P's promise. P replies that on the day set for performance C did not convey or offer to convey Blackacre to D. What decision?
9. In an action by C against P on a written guaranty of D's debt, P pleads (*a*) that D performed his contract on the day set for performance; (*b*) that D tendered performance by tendering the amount of the debt, which C refused to receive. What decision?
10. P and D jointly promise C to pay for goods sold to D. In an action by C against P, P pleads the following defenses: (*a*) That the contract of sale was induced by fraud. (*b*) That D was insane and not legally capable of contracting. What decision?

CAMBRIDGE SAVINGS BANK *v.* HYDE

131 Massachusetts Reports 77 (1881)

MORTON, J. This is a suit against the executors of one of the sureties upon a promissory note, held by the plaintiff. By the note which is dated October 16, 1871, the maker promises to pay to the plaintiff $6,000 on demand, with interest at the rate of $7\frac{1}{2}$ per cent per annum, payable semiannually. At the trial, it appeared that the treasurer of the plaintiff, some years after the date of the note, having authority to do so, wrote upon the back of the note the memorandum, "Rate of interest to be $6\frac{1}{2}$ per cent from October 10, 1876." The defendants asked the court to rule "that any change in the rate of interest of the note, whether made on the face of the note or by a memorandum in the margin or upon the back of the note, was a change in the terms of the contract, and a material alteration of the note such as would discharge the defendants' testator, if made without his consent, and that the indorsement upon the back of the note in suit was such an alteration, which ruling the court refused.

The defendants contend, in the first place, that this memorandum thus made was a material alteration, in the sense of a mutilation, of the note, which avoided it as to all parties not consenting to it. In the cases where it has been held that a material alteration of a note or other contract avoids it, there has been some change by erasure or interlineation in the paper writing constituting the evidence of the contract so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground of the decisions is that the identity of the contract is destroyed. But in the case at bar it is clear that, using the word in this sense, there has been no alteration of the note. The original note remains intact. It is in no respect altered or made different. The memorandum on the back is evidence of an independent collateral agreement, and has no more effect than if it had been written on a separate paper. *Stone* v. *White*, 8 Gray, 589.

The defendants also contend that, if the memorandum is to be treated as an independent collateral agreement, yet it makes such a change in the terms of the contract as to discharge the sureties, who did not consent to it. It is clear, that, if a creditor makes any agreement with the principal debtor, or does any other act which is prejudicial to the rights of the surety, the surety is discharged from his liability. Thus, if the creditor, by a valid agreement founded upon a

sufficient consideration, extends the time of payment of the debt, the surety is discharged. The reason is, that such an agreement materially affects the rights of the surety, since it prevents him from paying the debt and having an immediate remedy against the principal debtor. *Hunt* v. *Bridgham*, 2 Pick. 581; *Agricultural Bank* v. *Bishop*, 6 Gray, 317. Mr. Justice Story states the rule to be, "that if a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged." 1 Story, *Eq. Jur.*, section 325. The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him. Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged.

In the case at bar, the new agreement was, that, after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of $6\frac{1}{2}$ instead of $7\frac{1}{2}$ per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any time. The plaintiff could at any time have sued on the note, and the sureties could at any time have paid the note and have had a right to sue their principal at once. The agreement was merely a

stipulation to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change; and that the ruling of the superior court to that effect was correct.

Judgment on verdict for the plaintiff.

QUESTIONS

1. Was there not a change in the original contract in the principal case without the guarantor's consent? If so, why was he not discharged?
2. D gave C a note dated June 22, the payment of which P guaranteed in writing. Later, D and C made the date of the note June 23, which was the date they originally intended to be on the note. C sues P on the note. P pleads alteration of the contract. What decision?
3. D executes his note to C. P writes a guaranty of payment on it. D procures M to sign the note jointly with him. C sues P on his guaranty. What decision?
4. Suppose in the foregoing case D had procured M to sign as guarantor of the note. What decision?
5. P is a surety on D's bond as a bookkeeper for C. Later D is made cashier. As cashier he embezzles $5,000 from the bank. This is an action against P on his promise. What decision?
6. P writes to C: "If you will sell D goods on six months' credit, I will guarantee payment for them." C sells the goods on three months' credit. What are C's rights against P?
7. C is under a contract to advance $5,000 to D. At C's request P in writing promises to guarantee its payment when advanced. Suppose that C and D agree that the amount to be advanced shall be $7,500? or $4,500? What is the effect of the agreement in each case on P's promise?
8. P writes to C: "Advance D $500, and I will guarantee its repayment." C advances $900 to D. What are C's rights against P?
9. C contracts to sell goods to D, and P in writing guarantees payment of them. (*a*) C assigns his contract to B, who sells goods to D and sues P on his promise. What decision? (*b*) D assigns his contract to E to whom C sells goods and sues P on his promise. What decision?

10. P is guarantor of D's debt to C. Without P's consent, C promises to extend the time of payment for thirty days. At the end of thirty days, D is insolvent and cannot pay. C sues P as guarantor. What decision?
11. D owes C $500, which is now due and payable. P is guarantor of the debt. C offers to extend the time of payment in consideration of D's paying $250 immediately. Later, failing to collect the balance from D, C sues P. What decision?
12. P is guarantor of D's debt to C. P holds sufficient property of D to secure him against his contingent liability. C and D contract to extend the time of payment of the debt. What is the effect of the contract on P's liability?
13. D tenders payment of the debt at maturity. C refuses to accept it and later sues P. What decision?
14. P and D are jointly liable for a debt to C. As between P and D, the debt is D's. C and D enter into a contract for an extension of time for the payment of the debt. What is the effect of the contract on P's liability?

DINSMORE *v.* TIDBALL

34 Ohio State Reports 411 (1878)

The original action was brought by plaintiff in error on a bond executed to him by defendants in error, Tidball as principal, and his co-defendants, Shimp and Brosius, as sureties, to indemnify the Adams Express Company against loss from the unfaithfulness or dishonesty of the principal as station agent of the company at Alliance, Ohio, to recover on account of money embezzled by Tidball while acting as such agent.

The sureties defended, chiefly upon the ground that, previous to the execution of the bond, their principal having been engaged in the same employment, had proved a defaulter by appropriating moneys belonging to the company to his own use, all of which was known to the company, but of which the sureties were ignorant, and that they were induced to sign the bond by reason of the fraudulent concealment of the dishonesty of their principal from them by the company, its agents and managers.

A verdict and judgment were rendered against the principal and in favor of the sureties. This judgment was affirmed in the district court. The plaintiff now seeks to reverse the judgment below upon the grounds that the court erred in its charge, and the verdict is contrary to the testimony.

McIlvaine, J. We think there was no error in the charge of which the plaintiff in error can complain. This is clearly so as to the second and third paragraphs, wherein the liability of the sureties was affirmed in case the jury found the facts therein enumerated to be proved.

The only instruction, under which a verdict for the sureties could have been rendered, is found in the first paragraph. By this instruction, the elementary facts necessary to be found in order to exonerate the sureties were: (1) That the agent of the company, previous to the execution of the bond, had been guilty of embezzlement while in the same employment. (2) That the company or its officers had knowledge of his default, or, at least, believed, upon reasonable and reliable information, that such default existed. (3) That such knowledge or belief was not communicated to the sureties, although a reasonable opportunity to do so existed. (4) That the sureties had no knowledge or information in respect to such defalcation. (5) That the sureties, in signing the bond, "acted under a belief, from the recitals of said bond, that said Adams Express Company considered said Tidball a trustworthy person and would not have signed the bond but for such belief."

Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound, under all circumstances, to communicate to the guarantor every fact within his knowledge, which increases the risk; yet, we think there can be no doubt, either upon principle or authority, that where an agent has acted dishonestly in his employment, the principal, with knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge, under such circumstances, would be a fraud upon the guarantor.

The bad faith, in withholding from the guarantor such information, so material to the risk assumed, is manifested not only by the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal; but the holding of him out as a person entitled to confidence by continuing him in the service, was equivalent to a declaration that the principal had no knowledge of the dishonesty of the agent.

Assuming that the company had knowledge of Tidball's embezzlements (or a belief founded upon reasonable and reliable information,

which is the same in effect), the sureties were not deceived simply by the fact that the agent was continued in the service, but also from the fact that it was printed on the face of the bond, prepared by the company, that it had agreed to employ him as agent in its future business. That he had previously been in the same employment was known to these sureties, and while they were chargeable with a knowledge of the general character of their principal in the bond, they are certainly excusable, under the circumstances, for not making special inquiry of the company as to the manner in which he had conducted himself while in its employment.

It is, however, particularly claimed that under the charge, the jury could not have found from the testimony that a reasonable opportunity existed for communicating to the sureties, the fact of Tidball's delinquencies as agent before the execution of the bond, as it clearly appears that the company did not know, and had no means of knowing who the sureties were to be, until after the bond was signed and transmitted by mail to Damsell, at Crestline. In regard to this point, it is enough to say that, under the circumstances of this case, the absence of such opportunity is not a matter of excuse. But, if it were otherwise, then I would say that information of Tidball's delinquencies could have been communicated upon the face of the bond, as was the fact that the company had agreed to continue him in its employment.

Judgment affirmed.

QUESTIONS

1. D owed C $1,200 for goods sold and delivered. D, wishing to purchase more goods from C, procures P to guarantee payment for goods to be sold by C to D. C sold goods to D at a price higher than the market price, both agreeing that the excess should be applied to the discharge of the debt of $1,200. C sues P on his promise. Do the facts here recited constitute a good defense to the action?
2. P signed a note for D, in favor of C, on the representation that it was in payment for goods then being sold. The note was in fact in settlement of a pre-existing debt. What are C's rights against P?
3. At C's request, P, for a consideration, guarantees payment of a debt which D owes C. C sues P on his promise. P contends that he is not liable because C at the time he requested him to sign as guarantor knew that D was insolvent. What decision?
4. In the foregoing case, C offers to prove that he had no fraudulent intent in concealing D's insolvency. Should the evidence be admitted?

5. At C's request, P promises to guarantee payment for goods which C is about to sell D. In an action by C on P's promise, P pleads by way of defense that C did not disclose the fact that D owed him money for goods previously sold. What decision?
6. C is under a contract to furnish goods to D in such quantities as his business may require, at certain prices, for a year. P for a consideration makes C a written promise to guarantee payment for the goods thus sold. At the end of three months, C discovers that D is insolvent. He continues to furnish goods on D's order, without notifying P of D's insolvency. What are C's rights against P?

HARRIS *v.* NEWELL

42 Wisconsin Reports 687 (1877)

Action upon a promissory note in the usual form of a joint and several note, signed by the defendants, James Stewart and E. H. Newell, and running to one Chapman, or bearer. Stewart made default. Newell answered that the note was given for money loaned by Chapman to the defendant Stewart; that such loan was made solely for Stewart's benefit, and Newell signed it only as surety, all of which was well known to said Chapman; that when the note became due, Stewart was fully able to pay it and the amount could have been collected from him by law; that Newell notified Chapman, who was then still the owner and holder of the note, to proceed and enforce the collection thereof from Stewart; but that Chapman gave Stewart further time thereon, and neglected and refused to enforce the collection thereof until Stewart failed and became worthless and irresponsible. It is not alleged or claimed that Chapman received any consideration for giving further time.

Upon the trial, after the plaintiff had put the note in evidence and rested, the circuit court refused to receive any evidence in support of the answer, and directed the jury to find for the plaintiff against Newell. There was a verdict and judgment accordingly; and Newell appealed.

Ryan, C. J. A disposition is shown in some of the cases to overlook somewhat the distinction between sureties and guarantors; but the contract of a surety is essentially different from the contract of a guarantor. *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Craddock* v. *Armor*, 10 Watts. 258. The contract of a surety is collateral to the contract of his principal, and binds the surety for the contract of

the principal. It is not merely a contract to perform upon failure of the principal, but binds the surety equally with the principal for the performance of the contract of the principal. The surety assumes for himself the liability of his principal. And as Lord Eldon remarks in *Wright* v. *Simpson*, 6 Vesey, Jr. 714, as between the creditor and the surety, the creditor assumes no obligation of active diligence against his principal; and it is the business of the surety, not of the creditor, to see that the principal performs.

This is the legal contract. But, because the surety has no interest in the contract of his principal, and because the creditor or the principal debtor may prejudice the surety by delay, equity will sometimes interfere in behalf of the surety, either against his principal or against his creditor. In such a case the surety may proceed in a court of equity against the creditor, to compel him to proceed at law to collect his debt from the principal. 1 Story's *Eq.*, section 327; *Wright* v. *Simpson, supra; Hayes* v. *Ward*, 4 Johns, chap. 123; *Bishop* v. *Day*, 13 Vt., 81.

This well-established equitable jurisdiction appears to preclude the legal right claimed in this case for the surety; the right to notify the creditor to proceed, and upon failure of the creditor to do so, to stand released at law. For, if the surety could thus of himself put the creditor in motion, it is difficult to see why he should resort to a court of equity to do for him what he could do for himself.

This power to put the creditor in motion appears to be more safely reposed in the discretion of a court of equity than vested as a legal right at his option in the surety. The diligence of creditors is generally to be trusted; and when they forbear, it is generally from prudent motives, having regard to all interests concerned. The legal right of a surety to interfere against such forbearance might well be mischievous and oppressive. It is true that the creditors and principal debtor may collude to the prejudice of the surety. That would be a proper ground for equitable interference. But it is safer, in any case, to leave the surety to the equitable remedy, to be exercised in view of all the circumstances, than to make him his own chancellor to control the action of his creditor.

And it is not to be overlooked, that this jurisdiction of courts of equity does not proceed upon any limitation of the legal right of the creditor, or of the legal liability of the surety, but upon the general principle of equitable jurisdiction, to prevent oppression by the inequitable exercise of legal right.

The legal doctrine that a surety may interfere, on his own motion, between his principal and their creditor, and thus limit his own liability upon his own contract, may be said to be quite modern, and has not been generally adopted. It has always been held by all courts that mere delay of the creditor, without suspending his right to proceed against the principal, will not, in the absence of fraud, discharge the surety. But in *Pain* v. *Packard*, 13 Johns., 174, the court inaugurated the new doctrine, that notice by a surety to the creditor to proceed against the principal, and failure of the principal to proceed, to the injury of the surety, will operate to discharge the surety from his liability. And this appears to be still the rule of decision in New York. *Remsen* v. *Beekman*, 25 N.Y., 552.

As WALWORTH, C., remarks in *Warner* v. *Beardsley:* "In Pennsylvania, where they have no court of chancery to enable the surety to proceed in his own name to compel payment, it has, after much hesitation, been decided that where the principal is solvent, the surety will be discharged, if the creditor does not proceed and collect the debt, on request, or permit the surety to proceed in his name."

But we believe that the doctrine of *Pain* v. *Packard*, as a rule of judicial construction, is confined to those two states. There is a full and learned note to *Pain* v. *Packard* and *King* v. *Baldwin*, in the court of errors, by the learned authors of *Am. Lead. Cases*, by which it appears that the doctrine of those cases does not prevail in England, in the federal courts, or in the courts of any other state in which it has not been adopted by statute. The learned counsel of the respondent cited cases against the doctrine, from Maine, New Hampshire, Vermont, Massachusetts, Illinois, South Carolina, and federal courts. A review of these cases would fully sustain our view. And the learned counsel for the appellant cited in support of his position only cases in New York and Pennsylvania, and in Alabama, Arkansas, and Tennessee, which go upon statutes. There are, indeed, *dicta* in some of the cases turning upon statutes, approving the rule of *Pain* v. *Packard*. But these can avail little for the unsound doctrine against the strong and universal current of authority outside of the infected states. Indeed, the adoption in those states of such statutes may be regarded as a strong concession against the rule independent of them.

The question was not involved in *Gardner* v. *Van Norstrand*, 13 Wis., 543, cited for the appellant, and was, therefore, not considered by the court. Mr. JUSTICE COLE does no more than affirm the general doctrine,

that when a creditor does anything inconsistent with the rights of a surety, the surety will be discharged. But he does not attempt to define the rights of the surety, or the duty of the creditor.

There may, undoubtedly, be cases in which the equitable remedy might be too slow a proceeding to avail the surety. But he has always open to him a speedier and more satisfactory remedy, as suggested in *Gardner* v. *Van Norstrand*, and many other cases. He has an instant right to pay the debt and become subrogated to the rights of the creditor. He then becomes, as against his principal, *dominus litis*. It is said that this may be inconvenient. That is but another way of saying that it is inconvenient to become a surety.

With these views, we cannot doubt that the learned judge of the court below properly excluded the appellant's defense.

The judgment of the court below is affirmed.

QUESTIONS

1. Suppose that D and P sign a note jointly in favor of C, does C have to proceed against them jointly? If not, may he proceed in the first instance against P? Does it matter whether C knows that as between D and P, D is the real debtor?
2. Does C have to proceed first against a debtor before his rights against the debtor's guarantor become absolute?
3. P guarantees to C a debt of P, payable in six months. At the end of six months, C could have collected from D. Six months later D becomes insolvent. What are C's rights against P?
4. P informs C that D is likely to become insolvent at any moment, and requests that he sue D on the debt immediately. C fails to do so and D becomes insolvent. C sues P. Has P any defense?
5. If P has no defense in the foregoing case, was there anything which he could have done to have protected himself against such a contingency?
6. "A person bound as surety in a written instrument for the payment of money or other valuable things may, if a right of action accrue thereon, require his debtor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor; and unless the creditor commences an action within a reasonable time and proceeds with due diligence to recover judgment, the creditor shall thereby forfeit the right which he otherwise would have to demand and receive of such surety the amount due thereon." (*a*) Do you think this a wise statutory provision? (*b*) Is there such a statute in your own state?

FULLER *v.* TOMLINSON BROTHERS

58 Iowa Reports 111 (1882)

This action was brought against the defendants as guarantors of certain promissory notes. The petition shows that the defendants were appointed agents of the plaintiffs to sell mowing and reaping machines; that as a part of the contract under which they were appointed they guaranteed to the plaintiff "the collection and payment of all notes taken in payment for machines, within one year from the time such are due"; that under the contract the defendants sold certain machines, and took certain notes, which the defendants delivered to the plaintiffs with their guaranty indorsed thereon as provided in the contract, and which notes are the property of the plaintiffs, and more than one year past due. The defendants for answer averred that the notes were given for the purchase price of property belonging to the plaintiffs; that they contained conditions and stipulations, in substance, that the property sold, and for which the notes were given, should remain the property of the plaintiffs until the notes were fully paid; that the plaintiffs should have the power at any time even before maturity of the notes to sell the property at private sale, giving the makers credit for the net proceeds realized; and at the time the notes were turned over by the defendants to the plaintiffs, and guaranteed by the defendants, the makers of the notes still held possession of the property for which the notes were given; that it was of great value and formed good security for the notes; that the plaintiffs neglected and refused to take possession of the property, and sell the same, and apply the proceeds in payment of the notes; that the plaintiffs had the exclusive right to control the security; that at the time the notes were guaranteed, and afterward, at the time they matured, the makers were solvent, and the notes could have been collected at maturity, but the makers have now become insolvent, and the notes have become uncollectible through the negligence of the plaintiffs in not obtaining judgment against the makers, and in not availing themselves of the securities.

To the answer the plaintiffs demurred, and the court sustained the demurrer. The defendants electing to stand upon their answer, judgment was rendered for the plaintiffs for the amount claimed. The defendants appeal.

Adams, J. The defendants claim that the plaintiffs had what was equivalent to a lien upon the machines for which the notes were

given. This, the plaintiffs deny. But for the purposes of the opinion, this may be conceded. The first question presented, then, is whether the failure of the plaintiffs to take possession of the machines, and subject them to the payment of their debt, until it was too late to do so, constitutes any defense. In support of the defendant's proposition, that it does, our attention is called to the "familiar doctrine, that the surrender of any security by a creditor, held at the time a third person becomes surety for, or guarantor of, the debt will effect a *pro tanto* discharge of the surety or guarantor." 2 Daniel on *Negotiable Instruments*, section 1789; 1 Parsons on *Bills and Notes*, 242. Where such a surety or guarantor pays a debt. he is entitled to be subrogated to all the securities which the creditor had in his hands. A surrender of securities, therefore, is a direct impairment of the surety's or guarantor's rights. But the case before us is not one of the surrender of securities. The plaintiffs are charged simply with negligence, and in our opinion the defendants' position is not tenable. It may be conceded that if the plaintiffs had taken the machines into their possession, and while charged with responsibility for their proper custody and disposition, they had negligently allowed the machines to become impaired or destroyed, such negligence would have had the effect to discharge the defendants *pro tanto*. *Day* v. *Elmore*, 4 Wis., 214. But such case is not before us. We have a case where the holder of paper, who has a lien upon personal property for security, but is charged with no responsibility for its custody or care, fails to enforce his lien and the security is lost. We have seen no case which goes to the extent of holding that such failure can be set up in defense by a surety or guarantor, nor do we think that such is the law. If the surety or guarantor apprehends that the security will be lost, it is his privilege to pay the debt and enforce the lien himself.

We ought to remark that no question arises in this case as to a want of demand and notice, as demand and notice were expressly waived. Neither does any question properly arise as to the mere failure to obtain judgment against, or want of prosecution of, the makers of the notes. The guaranty is a guaranty of payment, as well as of collection. In our opinion the demurrer to the defendants' answer was properly sustained.

Affirmed.

QUESTIONS

1. What was the issue under consideration in this case? How was it decided by the court? What rule of law can be deduced from the decision?
2. Was there anything which the defendants in this case could have done to protect themselves? If so, what?
3. C advanced D $5,000 and, to secure the debt in part, D delivered to C stock in a corporation reasonably worth $2,500. For a consideration, P signed a written guarantee of the debt. Thereafter C returns to D the stock in question. D failed to pay the debt when due. What are C's rights against P?
4. In the foregoing case, P was ignorant of the fact that C held stock belonging to D when he signed the guaranty. What decision?
5. A gives C a mortgage on property to secure a debt for which P stands responsible. Because of C's delays in recording the mortgage, it becomes a second mortgage and insufficient to cover the debt. How does this affect P's liability?
6. D owes C a debt which is secured by a mortgage and by P's written guaranty. C might have foreclosed the mortgage and realized the full amount of the debt, but he refused to foreclose. He sues P on the written guaranty. P contends that he is discharged because the mortgage security is now worthless. What decision?
7. P is guarantor of a debt owed by C to D. C sues P on his promise for the amount of the debt. P pleads as a defense that D tendered payment of the debt; that D refrained from paying at the request of D; and that later D became insolvent and unable to pay. What decision?
8. C secures a judgment on D's debt and gets a lien on certain of his property by attachment. He loses this lien by lapse of time and brings an action against P. P pleads the foregoing facts as a defense. What decision?

SMITH *v.* STATE OF MARYLAND

46 Maryland Reports 617 (1877)

Robinson, J. This is a motion to quash an execution issued on a judgment recovered by the appellee against the appellants and Mary Payne, executrix of B. N. Payee, sureties on the bond of Nelson Cooper, one of the tax collectors of Baltimore County.

At the request of one of the heirs-at-law of Payne a statement was made, showing the ratable proportion due by each defendant in the judgment, and, upon the payment of Payne's proportion as

thus ascertained the appellee directed the clerk to enter the judgment satisfied as against his executrix.

The appellants contend that, being co-sureties, the entry of satisfaction as against the executrix of Payne, discharges them from all liability on account of said judgment.

Now, it is true that any valid contract or agreement between the creditor and the principal, or between the creditor and a surety, without the concurrence of co-sureties, whereby the latter are subjected to an increased risk, operates as a discharge of such sureties. And hence the release by a creditor of the principal, releases also the surety, because the latter is entitled, upon the payment of the debt, to be subrogated to all the rights and remedies of the creditor, and the creditor cannot, by his own act, prejudice or in any manner impair these rights without forfeiting his remedy against the surety.

It seems also to be well settled that the release of one or more sureties without the assent of the co-sureties will operate at law to discharge the latter, because it is a cardinal principle of suretyship that the surety has the right to stand by the very terms of the contract, and the creditor will not be permitted to change or alter the contract without concurrence of all the parties to it.

In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect unless it subjects the co-sureties to an increased risk or liability.

Accordingly, it has been held that where the creditor releases one surety, reserving his remedy against the others, the effect of such release operates only to discharge the co-sureties from the ratable proportion which the surety thus released ought to have contributed, and such further proportion as he ought to have borne arising from the insolvency of any of the other sureties.

It is difficult to imagine on what principle it can be maintained in equity, that the mere release of one surety discharges the other sureties from liability.

As between themselves, the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding this proportion.

If, then, the release of one surety discharges the others from the payment of the proportion of the debt, which such surety ought to have contributed, and discharges them also from the proportion which he ought to bear in the loss arising from the insolvency of any

of the other sureties, it is clear that such release can in no manner prejudice or subject the co-sureties to an increased risk. It follows then from what we have said that the payment of Payne's proportion of the judgment, and the subsequent entry of satisfaction as against his executors, could not in any manner affect the rights of the co-sureties, or subject them to an increased liability. The effect of that entry so far as they are concerned, is to release them from the payment of Payne's proportion of the judgment, and should any of the co-sureties prove insolvent, to release them from the payment of Payne's proportion of the loss arising from such insolvency.

In summary motions of this kind, courts always exercise a *quasi* equitable jurisdiction, and will not therefore order an execution to be quashed if it appears upon a consideration of all the facts and circumstances of the case it would be against well-settled principles of equity.

For these reasons, the motion to quash the execution, and strike out the judgment, was properly overruled.

Judgment affirmed.

QUESTIONS

1. P, M, and N are co-sureties or co-guarantors of D's debt to C. When the debt matures, D cannot pay it. How may C proceed to enforce his security?
2. P and M are co-guarantors of a debt of $5,000, which D owes C. C enters into a contract whereby he releases M as guarantor. What are his rights against P?
3. Would your conclusion be the same in the foregoing case if P was ignorant of M's contract of guaranty when P entered into his own?
4. Would your conclusion be the same in each of the two foregoing cases had it appeared that P and M were co-sureties for D?
5. C enters into a contract with M to release him as a guarantor of D's debt, but in the contract expressly reserves his full rights against P. What is the effect of such a contract on P's liability?
6. P and M are co-sureties for D's debt to C. M becomes insolvent and receives his discharge in bankruptcy. What are C's rights against P?
7. D owes C $6,000, for the payment of which P, M, and N are guarantors. C releases N as a guarantor. M becomes insolvent. What are C's rights against P?
8. P and M are co-guarantors of D's debt. C enters into a contract with M extending the time within which his promise may be enforced. What is the effect of such a contract on P's liability?

JORDAN *v.* DOBBINS

122 Massachusetts Reports 168 (1877)

Contract upon the following guaranty: "For value received, the receipt whereof is hereby acknowledged, the undersigned does hereby guaranty to Jordan, Marsh & Co. the prompt payment by George E. Moore to Jordan, Marsh & Co., at maturity, of all sums of money and debts which he may hereafter owe Jordan, Marsh & Co. for merchandise, which they may from time to time sell to him, whether such debts be on book account, by note, draft or otherwise, and also any and all renewals of any such debt. The undersigned shall not be compelled to pay on this guaranty a sum exceeding $1,000, but this guaranty shall be a continuing guaranty, and apply to and be available to said Jordan, Marsh & Co., for all sales of merchandise they may make to said George E. Moore until written notice shall have been given by the undersigned to said Jordan, Marsh & Co. and received by them, that it shall not apply to future purchases. Notice of the acceptance of this guaranty and of sales under the same, and demand upon said George E. Moore for payment, and notice to me of non-payment, is hereby waived. In witness whereof, I, the undersigned, have hereunto set my hand and seal, this twenty-eighth day of February, A.D. 1873. William Dobbins (Seal)." Annexed to the declaration was an account of goods sold to Moore.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiffs are partners under the firm name of Jordan, Marsh & Co., and the defendant is the duly appointed administratrix of the estate of William Dobbins. William Dobbins, on February 28, 1873, executed and delivered to the plaintiffs the above written contract of guaranty. The plaintiffs thereafter, relying on this contract, sold to said Moore the goods mentioned in the account annexed to the declaration, at the times and for the prices given in said account, all of the goods having been sold and delivered to Moore between January 16 and May 28, 1874. All the amounts claimed were due from Moore, and payment was duly demanded of him and of the defendant before the date of the writ. Other goods had been sold by the plaintiffs to Moore between the date of the guaranty and the first date mentioned in the account, but these had been paid for.

William Dobbins died on August 6, 1873, and the defendant was appointed administratrix of his estate on September 2, 1873. The plaintiffs had no notice of his death until after the last of the goods mentioned in the account had been sold to Moore.

If upon these facts the defendant was liable, judgment was to be entered for the plaintiffs for the amount claimed; otherwise, judgment for the defendant.

Morton, J. An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon.

In *Offord* v. *Davies*, 12 C.B. (N.S.) 748 the guaranty was of the due payment for the space of twelve months of bills to be discounted, and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal which might be revoked at any time before it was acted on.

Such being the nature of a guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability, which is created after his death, by the exercise of a power or authority which he might at any time revoke.

Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is in its nature nothing more than a simple guaranty for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death.

The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterward.

We are not impressed by the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

Judgment for the defendant.

QUESTIONS

1. P writes to C: "Advance D all the money he may need and charge it to me." What kind of an offer is this? How long will it continue in force? How can it be accepted? How revoked?
2. In the foregoing case, P dies before any advances are made to D. But C advances $500 to D, in ignorance of P's death, and $500 after knowledge of P's death. What are C's rights against P's estate?
3. In case No. 2, P sends notice to C: "Do not advance any money to D. I have just learned that he is insolvent." Before C receives the notice, he has advanced $500 to D. After receiving the notices he advances $500 more. What are C's rights against P?
4. P writes to D: "In consideration of your promise to furnish D $500 this year, in whatever sums he may demand, I will promise to guarantee its repayment." What kind of an offer is this? How can it be accepted? How revoked?
5. In the foregoing case, C replies: "I will advance the money as you request." Before any money is advanced, C is notified of P's death, but proceeds to advance the money to D according to the terms of P's offer. In case D fails or refuses to pay, what are C's rights against P's estate?
6. In case No. 5, C has advanced $1,000 to D when he receives a letter from P: "Do not advance any money to D." Notwithstanding this message, C advances $4,000 more to D. In case D does not pay, what are C's rights against P?

7. P becomes jointly liable with D to C for a debt of $500. As between P and D the debt is D's. P dies. C cannot collect from D. What are his rights against P's estate?
8. C sues P on his written promise to guarantee the debt of D. P pleads by way of defense that the debt owed by D to C is barred by the statute of limitations. What decision?

c) *Remedies of Surety and Guarantor*

MATHEWS v. AIKIN

1 Comstock's New York Reports 595 (1848)

Johnson, J. It is a general and well-established principle of equity, that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity which the creditor had against any other person or property on account of such debt. The general doctrine, as a rule of equity, is not controverted on the part of the appellants, but is fully conceded. It is insisted, however, by their counsel, that the guarantor in this instance did not become such at the request of the debtor; that as to the debtor, he was a mere volunteer, having no remedy over against him and never acquiring the character of a surety so as to be entitled to subrogation to the rights and remedies of the creditor.

The objection seems somewhat narrow and technical when addressed to a court of equity whose peculiar province is to mete out substantial justice where the more restricted powers of the common law fail in its administration. But it leads us to examine carefully into the grounds and principles upon which the right of subrogation rests. Does it rest upon the foundation of a contract binding in a court of law between the debtor and his surety? In other words, does it turn substantially upon the question whether or not the surety who has paid the debt to the creditor has a remedy over, on his contract, against the principal debtor for money paid in an action of law? or does it not rest rather upon the broader, deeper foundations of natural justice and moral obligation? Chancellor Kent says in *Hays* v. *Ward*. (4 John. Ch. 130): "This doctrine does not belong merely to the civil law system. It is equally a well-settled principle in the English law that a surety will be entitled to every remedy which the principal debtor has to enforce every security, and to stand in

the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another." Lord Brougham, in *Hodgson* v. *Shaw* (3 Myl. & Keene, 183), said: "The rule here is undoubted, and is founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication."

The equity is certainly as strong, and it seems to me somewhat stronger in favor of substitution, as against the creditor at least, than it is between sureties for contribution where one has paid the whole debt and it has been likened to the case of contribution between sureties. As between them the rule in equity is clear that the ground of relief does not stand upon any notion of mutual contract, express or implied, but arises from principles of equity independent of contract. Story's *Equity*, section 493, and notes, where the authorities are all collected. This is also substantially the rule in courts of law. (*Norton* v. *Coons*, 3 Denio, 130.) In that case the circumstances under which the defendant became co-surety were such as to repel the presumption of any promise to make contribution. But the court held that his being a surety on the same contract without qualification in terms was sufficient to fix his obligation to contribute, and that for the purposes of giving the plaintiffs a remedy the court would presume a promise. A promise was therefore imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability and the legal liability in such cases springs from the equitable obligation; the law courts having borrowed their jurisdiction in these particular cases from the courts of equity. In the present case it seems to me, if it were necessary, a court of equity ought to imply a promise on the part of the creditor to subrogate the surety to all his rights and remedies, in case he resorted to the latter for payment of the debt upon his guaranty. The equitable obligation resting upon him to do so seems to me most manifest.

QUESTIONS

1. What is meant by *subrogation?* How does this right arise? What is the theory underlying it? In what court is it enforced?
2. When does the right to subrogation arise? The guarantor has paid a part of the debt; is he entitled to subrogation *pro tanto?*
3. Is a surety as well as a guarantor entitled to the right of subrogation?
4. D owes C $500 which is secured by stock pledged with C. X, without D's knowledge or consent, pays the debt. X brings a bill asking that he be given the benefit of the stock held by C to secure the debt. What decision?
5. P binds himself as a guarantor of D's debt to C. At the time he enters into the contract he is ignorant that C holds collateral security from D. What are P's rights with reference to this security?
6. D makes a fraudulent conveyance of his property to defraud his creditors. P pays a debt owed by D to C. What are the rights of P under the circumstances?

LUMPKIN *v.* MILLS

4 Georgia Reports 343 (1848)

NISBET, J. This was a bill filed by the plaintiff in error, as administrator, to marshal the assets of his intestate. The defendant in his answer set forth that, as surety for the plaintiff's intestate upon a note of hand under seal, he had paid the debt of his principal, and therefore claimed in equity, to be subrogated to the rights of the creditor, and to come in, in the marshalling of the assets, as a bond creditor. The plaintiff in error claims that he is only an open-account creditor. The question, therefore, and the only question made upon this record, is this: Can a surety, in equity, upon the settlement of an insolvent estate, who has paid a debt of his principal due upon an instrument under seal, be subrogated to the rights, and substituted to the position of the creditor, so as to come in as a creditor under the instrument, or is he entitled only as a creditor by open account?

It is conceded in the outset, that the authorities upon this subject do not run a uniform course. The early English cases are with the defendant, and recognize the right of subrogation. Cases of the very highest authority in Great Britain, decided since our revolution, settle the rule differently, and deny his right to be paid otherwise than as a creditor by open account. The American authorities are also in conflict, but we think their preponderance is in favor of the

early British rule. The civil law also sustains that rule, and so do the authorities in those countries where the civil law is recognized. We think, upon principle, the rule of the British courts, anterior to our revolution, right. If it was not, it is obligatory upon us as law. The civil law is the parent of that rule, as it is, in truth, of many, very many, of the principles of equity which obtain in the English chancery courts. That code is not of binding authority upon us, but I recognize in it, in reference to many titles of the law, and among them that of principal and surety, the very best system extant. Its broader, and more reasonable, and less fettered, equity is gradually being transferred into the American jurisprudence. And where authorities are in conflict, and principles doubtful, a court does well to allow the Roman law to quiet the conflict and dispel the doubt. We have no difficulty, either upon authority or principle, in settling as the rule of this court, that a surety, who has paid the debt of his principal, is, in a court of equity, entitled, in all respects, to occupy, in the distribution of his estate, the place of the creditor.

It is a well-settled doctrine of the common law that a surety upon payment of the debt of his principal is entitled to an assignment of all the independent securities in the hands of the creditor, with all the remedies which he had to enforce them against the principal. The Roman law goes farther. By that law, not only is he entitled to these securities, but he is also entitled to be substituted as to the very debt itself, to the creditor, by way of cession or assignment. The debt in favor of the surety is treated not as a paid, extinguished debt, but as sold to him—all its original obligatory force continuing against principal. The surety is viewed in the light of a purchaser.

We are better satisfied with our judgment in this case, for the reason that the substitution does injustice to no one. The creditor of course has nothing to do with it—he is satisfied, and if the representatives of the principal, if he be dead, or if the principal debtor himself, being in life, can be presumed to be unaffected by the paramount equity of his sureties' claim, he and they must be presumed to be indifferent, whether it is allowed to him, or is reserved for creditors of a lower grade. Let the amount of the claim go either way, no injustice can be done to him. In any event, it goes in payment of his debts. If anybody is entitled to complain, it is the creditor, who holding a lower grade of claim, is excluded by the substitution of the surety. But, really, no injustice is done to him. The surety, by paying the debt to the creditor, abstracts from the

assets of the principal debtor just that amount which the creditor himself would have abstracted if he had not paid it. The surety could compel the creditor indeed to go upon that fund before resorting to him. So the creditor, by claim of lower grade, is in no worse condition than he would be if the surety had not paid the debt.

Our judgment, too, derives support from the obvious policy of all our own legislation relative to the substitution of sureties. That policy is to place the surety in the place of the creditor. Witness the several acts of the legislature giving to sureties the control of executions against their principals, when paid by them. Counsel for the plaintiff in error has sought to draw from these acts the contrary inference. The right of substitution being given by express act of the legislature, the inference, say they, is that, in the judgment of the legislature, it did not before exist. But we think the legislation of Georgia upon this subject is in affirmance of the right as it existed upon general equitable principles before, and is only intended to cumulate and simplify the remedy by which it is enforced.

Let the judgment of the court below be affirmed.

QUESTIONS

1. D executes a bond to C in the sum of $500, which P guarantees. P pays the bond when it matures. In making his claim against D's insolvent estate, is P a bond (preferred) or a simple creditor?
2. In the foregoing case when P pays the bond, why is not the obligation extinguished by payment?
3. C has a judgment against D which is a lien on D's land. P pays the debt. Is P a simple or a judgment creditor?
4. P as guarantor pays D's debt which is secured by a mortgage on D's lands. Is it necessary that P get a voluntary assignment of the mortgage from C to protect himself? If not, why not?
5. D owes C $1,000 for which D has given security. P, guarantor of the debt, enters into a contract with C by which C accepts $800 in satisfaction of the claim. What are the rights of P with respect to the security which D gave to C?
6. May the surety or guarantor waive his right of subrogation? How?
7. When does the statute of limitations begin to run against P's right to subrogation?

WELLS *v.* MILLER

66 New York Reports 255 (1876)

Appeal from order of the General Term of the Supreme Court in the sixth judicial district, reversing a judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial. This action was brought to compel contribution as between co-sureties.

In 1854 plaintiff and one Brown were partners in business at Elmira, doing business under the firm name of "G. W. Brown & Co." Brown was the manager of the firm, which was known to defendant, he having transacted a large amount of business with the firm. In January, 1854, Brown arranged with one Cromwell for a loan of $1,000 for his individual benefit, for which he was to give a satisfactory note. Brown executed a firm note for the amount, which defendant indorsed at his request. Brown stated to him, "We want $1,000 and can get it of Mr. Cromwell." Cromwell declined to accept the note, saying he wanted a note with the individual names of the parties and not one with partnership name. Brown thereupon drew up another note in the form of a joint and several note payable to the order of Cromwell. This he signed himself and presented to plaintiff for his signature. He informed plaintiff then for the first time of the former note and of Cromwell's refusal to accept it. He requested plaintiff to sign, stating to him that defendant would sign it also. Thereupon plaintiff signed without adding the word "surety" to his name. Brown took the note to defendant, told him of Cromwell's refusal to accept the first note and the reason, and that he had destroyed it; defendant signed under plaintiff's name. Upon receipt of the note Cromwell advanced the money as agreed. The referee found that when defendant signed the note he had no knowledge that it was for the individual benefit of Brown and supposed it was for the benefit of the firm, but that plaintiff had no knowledge that the defendant was ignorant of the real object of the note or that he supposed it to be for the benefit of the firm; that there was no communication, understanding, or agreement between plaintiff and the defendant in regard to the note or their liabilities to each other as sureties; that after the giving of the note Brown absconded and a judgment having been obtained against the parties to the note, plaintiff paid it. As a conclusion of law, the referee held defendant liable for contribution.

Church, C. J. The plaintiff claims that he was a co-surety with the defendant upon the note of Brown of $1,000, which he has paid, and that he is entitled to contribution. I have examined the case with considerable care and have arrived at a conclusion adverse to the plaintiff's right of recovery, and, without elaborating the subject, I shall briefly state the reasons which have influenced my judgment.

The right to contribution between co-sureties depends upon principles of equity rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other's engagement (14 Ves., 160; 2 Seld., 33; 2 Kern., 462). The equity springs out of the proposition that, when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits, and must bear equally all the burdens of the position. In such a case the maxim "equality is equity" applies. It is not sufficient that both parties are sureties—they must occupy the same position in respect to the principal, and without equities between themselves, giving an advantage to one over the other (58 N.Y., 583). And it is competent to prove by parol the relation of the parties, and that one surety agreed to indemnify another, or any extrinsic facts affecting the equities between them (2 Kern., 462).

The real question is, whether the same relation to Brown, within the comprehensive equitable rule referred to, did exist between these parties. On the part of the plaintiff, it is claimed that it is a case of ignorance on the part of the defendant, as to the fact that the plaintiff was a surety, and a signing on his part, under a misapprehension of the fact, induced partly by the representation of Brown, for which the plaintiff was in no sense responsible, and that the case of *Norton* v. *Coons* (6 N.Y., 33) is controlling in his favor. To determine this we must analyze the transaction. The plaintiff and Brown were co-partners, the latter being the managing member, and the defendant had done with the firm, through Brown, considerable business. If the defendant had loaned the money upon the first note made by Brown, in the name of the firm, the latter would have been liable upon the well-settled principle of mutual agency between partners within the scope of their business, although the money may have been borrowed for Brown, individually, provided the defendant was ignorant of that fact. (Story on *Part.*, sec. 102.) The same principle would apply in making the defendant a surety for the firm upon the first note signed by him. If Brown might bind the firm for money borrowed of the defendant, he might also bind the firm by procuring

his signature, as surety for the firm, to enable him to borrow money of a third person. It was one of the usual means of transacting the business of the firm, and he had implied authority, especially as managing partner, to do anything necessary for that purpose. If, therefore, the creditor had taken the note in that form, it is very clear that the plaintiff would have been liable upon it, and without the right of contribution against the defendant. As to the defendant, he would have occupied the position of principal, although as to Brown he was a mere surety. The creditor requested that the form of the note be changed by having the members of the firm sign their individual names, which was done, and the defendant again signed the note in that form, and this change has created the embarrassment in the case. Much stress is laid upon the fact that the plaintiff did not know of the making of the first note until the new note was presented to him, and that he then signed in fact as surety, and that he is therefore entitled to the benefit of that position within *Norton* v. *Coons* (*supra*). If there had been no other transaction but the signing of this note by the plaintiff, there would have been some force in this view. But he was then informed of the first note, and I assume of the signing of it, by the defendant as surety, and was told that the creditor desired the individual signatures of the firm. He, therefore, knew the facts which in legal effect constituted the defendant a surety for the firm, and is, therefore, chargeable with knowledge of the real position of the defendant upon the first note. True, the referee found that the plaintiff had no knowledge that defendant was ignorant of the real object of the note, or that he supposed it to be for the benefit of the firm. I construe this to mean that he had no affirmative knowledge, and had not been informed specifically of that ignorance. This is the only construction warranted by the evidence and by the other findings, and therefore it must be presumed to have been intended. The plaintiff was bound to presume ignorance on the part of the defendant from the form of the note and the manner of signing it. He knew that the defendant had undersigned a firm note as surety, got up to raise money, and the presumption is, and the plaintiff was bound to presume it, that he signed it with the intent and for the purpose which its form indicated. He cannot now say that he didn't know that the defendant was ignorant of the real character of the note. It was not claimed by him on the stand, nor is there the slightest evidence that he even supposed that the defendant had been informed that this money was for

the individual benefit of Brown, while the facts of which he was then informed indicated that the defendant thought as he acted, and that when the latter signed the note as surety for the firm he supposed it was for the benefit of the firm. Brown told the plaintiff that the creditor desired the change in the form of the note, and that the defendant would sign it, and the plaintiff was bound to presume that Brown would inform the defendant of the reason why a change was desired when he applied for his signature, and instead of requesting Brown to enlighten the defendant as to the character of the loan, or affixing the word "surety" to his name, or in any manner notifying him of his real position, he impliedly authorized Brown to continue the deception under which the defendant had acted, not perhaps designedly, but by acts which had that effect. Knowing facts charging him with knowledge that the defendant signed and intended to sign as surety for him, and by silence and implied authority, having contributed to induce him to again sign in the same character, it is inequitable, in my judgment, for the plaintiff to demand contribution, as much so as if the first note had been taken. His knowledge and acts amount to an authority and a ratification of all that Brown said and did to and with the defendant. It cannot be said in any just or legal sense that the defendant occupied the same relation to Brown that the plaintiff did in respect to this note. Brown had made a firm note as a partnership agent. When informed of it the plaintiff did not object to the use of the firm name for that purpose, nor to continue his liability in any form which his partner desired, and omitted all precautions calculated to inform the defendant of the true state of facts, and whether intended or not, his conduct was calculated to induce the belief, on the part of the defendant, that he was a principal with Brown, and the change in the form of the note does not, under the circumstances, alter the legal aspect of the case. I do not deem it necessary to consider the effect (if any) which should be given to the fact that the money was paid into the firm to the credit of Brown.

Order affirmed. Judgment absolute against appellant.

QUESTIONS

1. Were not the plaintiff and defendants co-sureties on Brown's note? If so, why was the plaintiff denied contribution from the defendant?
2. What is the nature of the right to contribution? What theory underlies this right? In what court is an action for contribution brought?

3. D borrows $5,000 from C. P and M guarantee its repayment. At maturity P pays the debt to C. What are the rights of P against M?
4. Would your answer to the foregoing question be the same if P had been ignorant of M's undertaking at the time he paid D's debt to C?
5. So far as contribution is concerned, does it matter whether P and M are co-sureties or co-guarantors?
6. P and M sign D's note. At maturity P pays the note and now seeks contribution from M. M by way of defense contends that he should not be compelled to contribute because P paid the debt voluntarily. What decision?
7. P and M, as sureties, signed D's note for $500, payable to C. Six years before the action herein, P had paid $400 on the note. Within the six years prior to the action, he had paid the balance. Assuming that a claim to contribution is barred in six years, what are P's rights against M in an action for contribution?
8. P and M are co-sureties for D in favor of C for a debt of $500. P pays C $250. C does not proceed against D or M for the balance. P asks contribution from M as to the $250 which he, P, paid. What decision?
9. P is surety for D who owes $500 to C. M enters into a contract with C by which he undertakes that P will perform his promise to answer for D's debt. P pays the debt to C and asks for contribution from M. What decision?

LIDDELL *v.* WISWELL

59 Vermont Reports 365 (1887)

Assumpsit. Appeal from the municipal court of Rutland. Plea of discharge in bankruptcy. Heard by the court on pleadings and an agreed statement, September Term, 1886, VEAZEY, J., presiding. Judgment *pro forma* for the plaintiff to recover the sum of $164.31 damages and $7.93 costs, it being one-third of the sum paid by the said Liddell to satisfy the judgment rendered against him on the note signed by the plaintiff, defendant, and seven other parties. In 1872, the plaintiff and defendant, residing at Hydeville, Vt., in common with other citizens, were interested in fitting up a lodge or clubroom for the use of a society to which they all belonged. To raise money therefore they executed a note, of which the following is a copy:

"Hydeville, April 1, 1872.

"One day after date we jointly and severally promise to pay D. L. Dawley or bearer three hundred dollars for value received, with interest annually."

There were several indorsements on the note. The note was delivered to said Dawley, the person named therein as payee, who

was also one of the signers and makers of the note and equally interested with the plaintiff and defendant in the purposes for which the money specified in the note was being raised. On receipt of the note said Dawley furnished the society the sum of $300, which was applied to the purposes contemplated. Dawley continued to hold the note for a year or two, when he sold and delivered the same to one Foster for a valuable consideration. Foster sued on the note and recovered judgment against the plaintiff, and in 1884 sold the judgment to one Davis, who recovered a second judgment against the plaintiff, which was paid by the plaintiff under compulsion of an execution, amounting, August 5, 1885, to the sum of $491.21. Of the nine signers of the note three died insolvent prior to August 5, 1885. One, J. W. Lee, resides in this state, but is insolvent; one, E. H. Fifield, long ago removed from this state; one has recently died, but his estate is solvent; said Dawley removed to Colorado and died there prior to said August 5th, but was solvent when he sold the note and at the time of his death. On April 2, 1878, the defendant, in the U.S. District Court for Vermont, received a discharge in bankruptcy from all debts and liabilities provable under the U.S. Bankrupt Act.

ROSS, J. There were nine signers to the note of April 1, 1872. Between themselves each signer was principal, for the payment of one-ninth of the note, was surety to each other signer for the payment of one other ninth, and co-surety for the payment of the other seven-ninths. These relations the plaintiff had to each of the other signers. He has been compelled to pay the whole note, with an accumulation of interest and costs. He seeks contribution from the defendant. The defendant has interposed his discharge in bankruptcy, obtained before the plaintiff was compelled to make payment. As to the ninth of the note for the payment of which the plaintiff was principal, he has no right of contribution from anyone, regardless of the defendant's discharge in bankruptcy. To the ninth of the note for the payment of which the defendant was principal and the plaintiff his surety, we think the discharge in bankruptcy is a bar. It was held to be so under the bankrupt law of 1841. The plaintiff's right to indemnity arises from the contract of suretyship. The law of 1841 allowed contingent demands to be proved, and the liability of a surety for his principal was held to be such a demand—a demand arising from the contract itself. A distinction was taken between a contingent demand and a contingency whether a demand will ever exist. The liability of a surety for his principal was held to be the former

and the equitable liability between co-sureties to sustain the burden of suretyship equally, to be the latter. Hence, while the former was held to be barred by a discharge under the law of 1841, the latter was held not to be barred when the payment was subsequent to the discharge. *Swain* v. *Barber*, 29 Vt. 292.

By the bankrupt law of 1867 all provable claims and demands are barred by a discharge. It provides for proving "contingent debts and liabilities contracted by the bankrupt," in two ways: first, by proving the whole claim and receiving a dividend thereon, if the contingency happen before the order for final dividend; secondly, by having the value of such debt or liability ascertained under an order of the court, proving and receiving a dividend on the amount so ascertained. The liability of the principal to indemnify his surety is a contract liability, a direct liability of the surety to the creditor in actual existence, provable under the bankrupt law of 1841, though the surety had paid nothing thereon. *Mace* v. *Wells*, 7 How. 272. The bankrupt law of 1867 also, as we have seen, permits such liabilities to be proved. Hence for the ninth of the note for the payment of which the plaintiff was the surety of the defendant, the defendant's discharge in bankruptcy is a bar.

The plaintiff and defendant were co-sureties for the payment of the other seven-ninths of the note. When the defendant obtained his discharge no contingent liability for contribution existed in favor of the plaintiff, only a contingency that such a liability might thereafter arise if the plaintiff should ultimately be obliged to bear more than his proportionate share of the common burden that might be cast upon him in the payment of that part of the note for which they were co-sureties. The implied obligation of the defendant to bear his proportionate share of the common burden resting on all the co-sureties is not regarded as arising from contract, but from an equitable duty which the sureties are supposed to be cognizant of, and assent to, at the time they enter into the contract of suretyship. 1 Lead. Cas. Eq. notes to *Deering* v. *Earl of Winchelsea*, 84, and cases there cited.

In *Mason* v. *Lord*, 20 Pick. 447, SHAW, C. J., says: "The action of assumpsit for contribution is founded purely on equitable principles It proceeds upon the broad ground that when two or more are subject to a loss or burden common to all, and one bears the whole or a disproportionate part, it lays an equitable claim for contribution from those who are thereby proportionably relieved." The doctrine thus

announced has been adopted by this court in *Mills* v. *Hyde*, 19 Vt. 59; *Strong* v. *Mitchell*, 19 Vt. 644. Not being a contingent liability contracted by the defendant existing at the time of his discharge, it was not provable against his estate in bankruptcy, and is not barred by his discharge.

On the facts shown, by the agreed case, the plaintiff is under no more duty to go into a foreign jurisdiction, and attempt to secure some indemnity from the estate of D. L. Dawley than is the defendant. It may be doubtful if anything can be secured from that estate, and if there can be, it will doubtless be attended with trouble and expense. From the equitable principles which control this class of liabilities the plaintiff and defendant are in duty bound to share equally the common burden. Hence the defendant cannot be heard to claim that it is the duty of the plaintiff to go to the distant state of Colorado and endeavor to secure something from the estate of Dawley to relieve the defendant from a part of the common burden now resting wholly on the plaintiff. It is held in this state, and generally, that insolvency of one or more of the co-sureties is regarded in actions at law for contribution, and that the share to be recovered by one who has paid the whole debt is determined by the number of solvent sureties; and it has been held by other courts that removal from the state is for this purpose equivalent to insolvency. 1 Lead. Cas. Eq., *supra; Boardman* v. *Paige*, 11 N.H. 431.

The *pro forma* judgment of the county court is reversed, and judgment rendered for the plaintiff to recover one-third of seven-ninths of the debt and costs paid by him August 6, 1885, with interest thereon since August 6, 1885, and his costs.

QUESTIONS

1. The court says that each of the nine signers was principal for one-ninth of the amount of the note, surety for each other signer for a ninth, and a co-surety for the payment of the remaining seven-ninths. How does the court arrive at these conclusions?
2. Would the plaintiff, in the principal case, have been entitled to contribution from the signer who died in Vermont, leaving a solvent estate?
3. Why was the defendant's discharge in bankruptcy a bar to the plaintiff's claim against the defendant for contribution as to the one-ninth of the debt for which the defendant was primarily responsible?
4. Why was not the defendant's discharge in bankruptcy a bar to the plaintiff's right to contribution as to the seven-ninths of the debt for the payment of which the defendant was a co-surety of the plaintiff?

5. D owes C $2,800 on a note. M, N, O, P, Q, R, and S signed the note as sureties. C paid the debt at maturity. At this time, D had been discharged in bankruptcy; M had died, leaving a solvent estate; N had died, leaving an insolvent estate; O was insolvent; Q had moved to another state, but was still solvent; R and S were still in the state and solvent. Work out P's rights against the various parties.
6. Suppose that Q, in the foregoing case, moves back into the state, what is his liability, if any, as to this debt?
7. M, N, and P signed D's note in the sum of $1,200 as co-sureties. P paid the note at maturity. At the time P signed, he received collateral security from D to indemnify him against loss. He recovers contribution from M and N. Later, he sells the collateral security for $600. How must P dispose of the money so received?

THAYER *v.* DANIELS

110 Massachusetts Reports 345 (1872)

Contract. The declaration alleged that the defendant as principal, and the plaintiff as surety, signed a note for $500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety without consideration, and for the accommodation of the defendant; that the defendant failed to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allegations of the declaration, and also set up the statute of limitations and a discharge of the defendant in insolvency.

At the trial in the Superior Court, before BACON, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the third meeting of the creditors George proved the note against the defendant's estate, that a small dividend was then declared; that afterward, in August, 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note $500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due; and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Ames, J. There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by that statute cannot be maintained. *Appleton* v. *Bascom*, 3 Met. 169; *Hall* v. *Thayer*, 12 Met. 130.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying the note in whole or in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under the Gen. Sts. c. 118, section 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of *Mace* v. *Wells*, 7 How. 272, which is relied upon by the defendant, arose under the bankrupt act of 1841, a statute which differed from our insolvent law, in allowing sureties and other parties under a contingent liability to prove such contingent liabilities as claims upon the estate, and "when their debts and claims become absolute," to have them allowed.

The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Exceptions overruled.

QUESTIONS

1. P guarantees a debt of D which he pays at maturity although not compelled to do so. Does P have any recourse against D? If so, what is the nature of his claim? How does it arise? When does it arise? Where will it be enforced?

2. When does the statute of limitations begin to run against the claim of P against D?
3. P, guarantor of a debt of D, pays half of it and brings action against D for indemnity. D contends that in no event is P entitled to indemnity until he has paid the whole debt. What decision?
4. D executed this note to C for $500. P signed the note as guarantor. At maturity C accepted a horse from P, reasonably worth $350, in satisfaction of the debt. How much, if anything, is P entitled to recover from D?
5. In the foregoing case C accepts P's negotiable note in satisfaction of the claim. Is P entitled to indemnity from D before he pays the note?
6. Suppose that C permits the statute of limitations to run against the note, does P have any recourse against D?
7. D owes a debt to C, which is guaranteed by P. C permits six years to elapse after the note became due before attempting to collect it. At C's request, P pays the note. Assuming that action on the note against D was barred by the statute of limitation, what are P's rights against D?
8. D, owing C $500, dies. C fails to make his claim against the estate within the statutory time within which such claims are required to be presented. He thereupon sues P. What decision? Suppose he recovers, what are P's rights against D's estate?
9. D owes C $500. C by fraud induces P to guarantee the payment of the note. At maturity P pays the note and sues D. D contends that he is not liable to P because P might have avoided his promise to C. What decision?
10. In the principal case why was P's right to indemnity from D barred by D's discharge in bankruptcy?
11. The National Bankruptcy Act of 1898 provides: "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name." (*a*) What would have been the decision in the principal case under this provision? (*b*) C proves under this provision and gets one-third of his claim. Can he recover the balance from P? If so, does P have any recourse against D?

DOBIE *v.* FIDELITY & CASUALTY COMPANY OF NEW YORK

95 Wisconsin Reports 540 (1897)

One Knute Anderson obtained a judgment against M. C. Burke and John Burke. The action was for personal injuries. The Fidelity & Casualty Company was an insurer of the Burkes against such claims, and was defending the action. It procured Dobie and Tennis to

become sureties on the appeal, and gave them its own bond in the sum of $7,000 to indemnify them, conditioned to "answer for all damages, interest, and costs, if any, that shall be adjudged" against the defendant, and "to save said Tennis and Dobie harmless from all costs and damages on account of their obligation as sureties." Judgment went against the defendant on the appeal, and Tennis and Dobie became liable on their undertaking. No part of the judgment has been paid. The plaintiff brings this action to compel the defendant, the Fidelity & Casualty Company, to pay the judgment, and so exonerate the plaintiff from liability. The plaintiff had judgment upon the pleadings, according to the demand of his complaint, and the defendant appeals.

NEWMAN, J. The question presented is whether the complaint states a cause of action. The action is by a surety to compel his principal to pay the debt for which both are liable, for the exoneration of the surety. It is ultimately the defendant's liability. That party is the principal debtor, who is ultimately liable for the debt. The question is whether a surety can, in equity, compel his principal to exonerate him from liability, by extinguishing the obligation, without having first paid it himself. It seems to be well settled that a surety against whom a judgment has been rendered may, without making payment himself, proceed in equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety, 2 Beach, *Mod. Eq. Jur.* section 903; 3 Pomeroy, *Eq. Jur.* section 1417; Willard, *Eq. Jur.* 110; *United N.J.R. & C. Co.* v. *Long Dock Co.*, 38 N.J. Eq. 142; *Beaver* v. *Beaver*, 23 Pa. St. 167; *Gibbs* v. *Mennard*, 6 Paige, 258; *Warner* v. *Beardsley*, 7 Wend. 194; 7 Am. & Eng. Ency. of Law, 486, cases in note.

Judgment affirmed.

QUESTIONS

1. What is the right of exoneration? What is the nature of the right? Under what circumstances is it available to P? In what court is it enforced? Why is it given to P?
2. P guarantees a debt of D to C. D enters into a special contract with P to save him harmless. At maturity of the debt, P asks for specific performance of D's promise to save him harmless. D contends that there is no reason for such a decree, because P will have a right to indemnity as soon as he pays the debt. What decision?
3. C advances $5,000 to D to secure the repayment of which D gives a mortgage on his land and induces P to sign his note as surety. C is

threatening to sue P on his promise. Has P any power to prevent the collection of the debt by C at the present time?

4. P and M are co-guarantors of D's obligation to pay C the sum of $10,000. P realizes that D will not be able to pay the debt when due and that C intends to proceed against him for the whole amount. Is there any way in which P may avoid the inconvenience of paying the whole debt and suing M for contribution?

CHAPTER III

POWERS OF CREDITORS

A

A study of the specialized credit-raising devices, without some understanding and appreciation of how the rights of creditors are enforced, would be incomplete. These devices, obviously enough, are useful only in so far as they carry some assurance that the obligations created by them will be enforced. A right without a remedy may be conceived of in the abstract, but practically speaking there can be no such thing as a right without a remedy. It should be equally clear that remedies can be thought of only in terms of legal machinery for making them dynamic and effective. Credit is created upon the assumption, expressed or implied, that proper remedies for creditors exist and that sufficient legal machinery is available for vitalizing those remedies.

The courts, through a long course of experience, co-ordinated with their experience in the development of rights, have evolved an elaborate set of rules defining the remedies of creditors; and the state through legislation has established legal machinery for the enforcement of these remedies. These remedies and the machinery necessary in their enforcement involve highly technical considerations of court procedure and can be dealt with only in a very general way.

And only in connection with certain powers of creditors which spring from the use of the various credit devices. A power, as here understood, may be defined as the ability on the part of the creditor to set in motion the legal machinery for the enforcement of the obligation assumed by the debtor. It is the ability of the creditor, with the aid of the legal machinery furnished him, to subject the property of his debtor to the satisfaction of the debt.

B

The most obvious of the powers enjoyed by creditors is the power to bring an action in the proper court and to reduce that claim to a judgment. A judgment in favor of the creditor is formal pronouncement of the court that the debtor is indebted to him in a certain

amount; a judgment against him is an equally formal pronouncement that his alleged claim against the debtor is without foundation. If the creditor secures a judgment in his favor, the original claim no longer exists; it is merged into a new and higher obligation, the judgment; and it is thereafter known as a debt of record.

A judgment is a preliminary but essential step in the process by which the creditor is able to subject the property of the debtor to the payment of his claim. With the aid of a judgment, he may set in motion additional legal machinery for securing payment through the liquidation of the assets of the debtor; but without it, he is forced to rely for satisfaction on the voluntary act of the debtor.

BATCHELDER *v.* CARTER

2 Vermont Reports 168 (1829)

HUTCHINSON, J. The principal question in this case is whether the possession of the property in controversy was sufficiently changed from N. Batchelder to the plaintiff to vest the same and render the sale complete as against the creditors of N. Batchelder. It is scarcely contended by the plaintiff's counsel that there was a sufficient change of possession according to various decisions of this court, unless this should be considered as a sheriff's sale, like that in *Kidd* v. *Rawlinson*, 2 Bos. & P. 58, and *Boardman* v. *Keeler*, reported in Aikens. Indeed, there seems to be no change of possession whatever. The same day that the plaintiff bid off the property, N. Batchelder, the former owner, carried, with the sleigh and horses (which was the property in suit), a load of pork to the plaintiff's house, and went home with them, and they were kept at his barn, upon his hay, as before they were attached. Nor was the possession varied by what appears to have been said or agreed about J. W. Batchelder's having them to perform a journey to Boston; for as yet he had no possession or care of them. Was there, then, a sheriff's sale? Carter, the defendant, as deputy sheriff, had attached the same property upon a writ in favor of Ira Batchelder against N. Batchelder, upon a note owned by Center Lamb and Company. Carter had kept the property about a week when by the mutual agreement of Lamb, N. Batchelder, the plaintiff, and J. W. Batchelder, the property was sold at auction, without any previous advertising. Carter acted as auctioneer; the plaintiff bid off the property in question; and probably J. W. Batchelder bid off the

remainder, for he and the plaintiff gave to Lamb their note for the whole debt, being about $170.

We cannot view this as a sheriff's sale. Carter was sheriff, to be sure, and had, for about a week, kept the property in his custody under a writ; but that writ authorized no sale, nor was there a pretense of a sale under it. Carter derived all of his power to sell from an agreement of the parties; and any other person might have been agreed upon as well as he. And no precept whatever could have authorized so sudden a sale without the agreement of the parties, and such an agreement would answer as well without a precept as with. A sheriff's sale, such as was intended in the case of *Boarman* v. *Keeler*, supposes a judgment establishing a debt due, and execution upon that judgment; that delivered to an officer under oath to be faithful and impartial; a levy upon such property by such officer; advertising the same for sale at least fourteen days; naming some public place for the sale; and exposure of the property for public sale by such officer at the time and place thus advertised, so that, not only the debtor himself and that particular creditor, but all the creditors of the same debtor may attend and bid upon the property and prevent a waste for want of bidders; and, in the end, a return by such officer of the sale upon such execution, to the office whence it issued, where it may be seen by any person who may desire to see it. No feature of all this proceeding is apparent in the sale now under consideration.

As the court, in their instruction to the jury, considered it as a sheriff's sale, and one that need not be followed by possession, a new trial must be granted.

Judgment reversed.

QUESTIONS

1. D owes P $500 which he refuses to pay. May P seize and sell property of D and reimburse himself from the proceeds of the sale? May he cause a sheriff to seize and sell D's property and secure reimbursement from the proceeds?
2. Trace the steps by which the creditor can secure satisfaction of a debt from an unwilling debtor through execution and levy?
3. The debtor has the following property: (*a*) cattle, farming implements, and money; (*b*) a mortgage on X's farm; (*c*) a farm on which Y holds a mortgage; (*d*) a life-estate in Blackacre; (*e*) a lease for ten years on Whiteacre; (*f*) growing crops; (*g*) standing timber. Which of the foregoing may be seized under an execution?

4. The debtor has the following property: (*a*) stock and bonds; (*b*) money on deposit in a bank; (*c*) a seat on a stock exchange; (*d*) a patent on a certain article; (*e*) a franchise to be a corporation; (*f*) a franchise to run a street railway in city streets. Which of the foregoing may be seized under an execution?
5. T holds property in trust for D, the debtor. Can D's interest in the property be reached under an execution? If not, how can the creditor get at this property, if at all?
6. Point out the requirements for a valid sale of the debtor's property under execution and levy. What are the reasons for these different requirements?
7. Property of the debtor is seized and sold under an execution. The proceeds of the sale are insufficient to satisfy the debt. What may the creditor do thereafter?
8. The proceeds of the sale are more than sufficient to discharge the debt. What must be done with the surplus?

WHITE *v.* SIMPSON

107 Alabama Reports 391 (1894)

Brickell, C. J. A garnishment is essentially a statutory remedy; though derived, it is said, from the customs of London, it is not a common-law remedy, and would not, in the absence of statutes authorizing it, exist here. It is not like summary statutory proceedings, in derogation of the course of the common law, subjected to a strict construction; it is a species of attachment, and falls within the influence of the statutory injunction that "the attachment law must be liberally construed to advance the manifest intent of the law." (Code, sec. 2998.) Originally it pertained exclusively to courts of law, until authority to employ it as a remedy to obtain satisfaction of devices for the payment of money was extended to courts of probate and the courts of chancery. When employed by courts of law, it is intended to reach choses in action not capable of seizure through execution or attachment, or to compel the discovery of effects capable of seizure, in the possession of a third person. Fraud upon creditors of the defendant in attachment or judgment not intervening, or being imputed, it operates only upon the legal rights of the defendant; such rights as by action at law he could in his own name enforce. It is not intended, and it is not more adapted than any other legal remedy, to reach, subject, or enforce equitable rights, rights, the cognizance and enforcement of which lie within the province of a court of equity. As

often described in the course of judicial decisions, especially when the purpose is to reach and subject choses in action, *it is the institution of a suit by a creditor against the debtor of his debtor.* (1 Brick., Digest, 171.) If the plaintiff is successful in the prosecution of the remedy, the judgment, whether it be rendered on the answer of the garnishee admitting an indebtedness or on the contests of answer denying the indebtedness or on the contest of the right of a third person to the indebtedness, is rendered for and in the name of the plaintiff, for an amount not exceeding his judgment against the defendant. (Code, secs. 2976, 2983, 2985.) So long as unreversed, the judgment, which is aptly termed a judgment of condemnation, is conclusive as between the garnishee and the defendant. (Code, sec. 2993.)

The service of the garnishment creates a lien or demand due or owing from the garnishee, a lien which is inchoate but is incapable of impairment by any arrangement or transaction between the defendant and the garnishee, or by any act of either. The rendition of judgment of condemnation perfects the lien and substitutes the plaintiff as judgment creditor, to the place and stead of the original creditor, the defendant in judgment or attachment. In *Cottrell* v. *Varnam*, 5 Ala. 231, it was said, "By the service of a garnishment on a debtor of the defendant, the plaintiff acquires a lien on the debt for the satisfaction of his demand, which cannot be divested by any arrangement between the defendant and the garnishee; and the judgment only consummates the legal transfer of so much of the garnishee's indebtedness as is condemned thereby to the payment of the plaintiff's demand." In *Huie* v. *Garrett*, 10 Ala. 299, it is said, concerning a judgment against a garnishee, "By the judgment rendered against Garrett, as the debtor of Huie, the right to receive the debt was transferred to Dewey, the creditor, and it became *quasi* his debt." In *Strong* v. *Smith*, 1 Metc. 476, SHAW, C. J., said, "The trustee process [the name by which the garnishment process is known in Massachusetts] operates as a species of compulsory statutory assignment, by which a creditor may obtain that by operation of law, which his debtor might voluntarily assign to him in payment of his debt." In *Campbell* v. *Nesbit*, 7 Neb. 300, it was decided that an attachment of a debt secured by a mortgage gave the creditor the same right to enforce the mortgage for the payment of the debt which the judgment debtor previously had.

The purpose of garnishment is to compel the garnishee to pay to the plaintiff the debt he owes to the defendant; and the operation and effect of the judgment of condemnation is the subtitution of the

plaintiff as the creditor, in the stead and place of the defendant. Payment to him extinguishes the debt as fully as payment to the defendant would have extinguished it, if made before the issue and notice of garnishment. The change of creditors marks no change in the obligations or incidents of the debt. These follow the debt as they would follow, if the change had been wrought by the convention or agreement of the plaintiff and defendant, instead of by the compulsory process of the law. If that was not true, the value of the process would be lessened; it would be circumscribed and narrowed for the benefit of the garnishee only, to the prejudice of the original and of the substituted creditor. The debt, the foundation of the judgment against the garnishee, was a legal demand; here it was a promissory note, payable to the defendants in attachment. But it is quite an error to suppose that where a creditor succeeds in condemning legal assets, he is confined to legal remedies to render them available. He may pursue whatever of equitable remedies any judgment creditor may pursue; and if there is an equity inhering in the assets, that equity he may enforce.

QUESTIONS

1. What is meant by *garnishment?* What is the nature of garnishment proceedings?
2. Under what circumstances is garnishment available as a remedy to the creditor? Must he have secured a judgment against the principal before he can resort to garnishment proceedings? Must the creditor show that the debtor has no property in the jurisdiction which can be reached under a writ of execution?
3. In general, what property can be reached under garnishment proceedings which cannot be reached under a writ of execution?
4. What is the effect of the service of garnishment process upon the garnishee? What is the effect of a judgment of condemnation against the garnishee?
5. P secures a judgment against D for $500. Garnishment proceedings are instituted against X who owes D $500. X, after service of the process upon him, pays the money to D who absconds with it. What are the rights of P under the circumstances?

HABER AND COMPANY *v.* NASSITTS

12 Florida Reports 589 (1869)

WESTCOTT, J. A brief inquiry into the history of attachment proceedings will enable us to ascertain with more certainty what is the general purpose, intent, spirit, and effect of these statutes.

No such process was known at common law, and the proceeding is traced to a custom of London whereby "if a plaint was affirmed and was returned *nihil*," the plaintiff had a garnishment against debtors of the defendant and after certain proceedings was entitled to judgment. Under these proceedings, without personal service upon the defendant, debts due the defendant, which were not *res* that could be reached by a *fieri facias* at law, were subject to his claim. In this and in most other states, while the remedy extends to subjecting debts due the defendant by process of garnishment under the custom, it is more comprehensive, extending not only to such sums as may be due the defendant, but making equally subject to its grasp the entire real and personal estate of the defendant, except in so far as local exemptions may protect it, with the additional difference, too, that here there must be either actual or constructive service of the defendant before judgment.

It is a special proceeding at law in the nature of a proceeding *in rem*, giving an extraordinary remedy to the creditor when the debtor is guilty of any act which manifests fraudulent intent, or has a tendency to impair the debt, or to postpone or delay proceedings at law for its collection, or when, on account of non-residence or other enumerated causes, personal service of process cannot be accomplished, thus in effect making the property of the debtor the means through which, not only notice is often given of the suit, but by which ultimately, through the instrumentality of a judgment, the claim is satisfied. These particular facts or causes are as various as the views of the legislatures of the several states and are such as the different interests of commercial or agricultural communities may, in the judgment of those who make laws for them, require. There is one thing, however, which may be said of this legislation, and which is true of every statute as interpreted by this judiciary, which is that, when there is no concurring act which operates to delay or endanger the debt or impair the means of its payment by decreasing the amount of property within the jurisdiction or some such like thing, *the simple fact that the debt is due is never held sufficient.* Take the fact of non-residence. Here the debtor is beyond the jurisdiction, while his property is within the jurisdiction, of the creditor, and we have combined two facts: first, the debt is due; second, there is no remedy within the jurisdiction where there is property. Service cannot be perfected at law except through this proceeding *quasi in rem.* These facts otherwise operating to postpone the collection of the debt, and

to send the creditor to the jurisdiction of the debtor, unless he has a lien which can be enforced in equity, the remedy by attachment at law is generally given against non-resident debtors. It is for reasons very like unto these stated above that a remedy is given where the party is about to remove out of the state, because the natural result of such an act, under ordinary circumstances, is to place the creditor in a position differing from that which he occupied when the debt was contracted—such a position as hinders its collection, or otherwise operates to the detriment of the creditor on account of a threatened removal of the debtor's person beyond the jurisdiction.

QUESTIONS

1. What is the nature of attachment proceedings? What is the purpose of such proceedings?
2. What is the difference between a writ of attachment and a writ of execution? between a writ of attachment and a writ of garnishment?
3. Does the creditor have to show that he has a judgment against his debtor before he can resort to attachment proceedings?
4. Statutes usually provide that the creditor can resort to attachment proceedings in the following cases: (*a*) when the debtor absconds or absents himself from the state or conceals himself in the state for the purpose of avoiding service of process; (*b*) when the debtor is a non-resident of the state; (*c*) when the debtor has made a fraudulent transfer of his property; (*d*) when it can be shown that the debtor is about to dispose of his property in fraud of creditors; (*e*) when it can be shown that the debtor has moved, or is about to move, his property from the state; (*f*) when it can be shown that the debtor has concealed, or is about to conceal, his property within the state. Why are the foregoing acts made grounds for attachment of the debtor's property?
5. What property can be reached under a writ of attachment?
6. What protection has the debtor against wrongful attachments of his property?
7. P brings an action against D and, in connection with the action, attaches property belonging to D. The court gives judgment in the main action for P. How does P thereafter realize upon D's property in satisfaction of the judgment?
8. In the main action, the court gives judgment for D. What is the effect of this judgment on the attachment process?

BEAN *v.* SMITH

2 Mason's Circuit Court Reports 252 (1821)

Story, J. The Statute of Thirteenth Elizabeth, ch. 5 (1570), in the first section declares, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, etc., goods, etc., made with intent to delay, hinder, or defraud creditors and others, of their just actions, suits, debts, etc., "shall be from henceforth deemed and taken *only as against that person or persons*, his or their heirs, etc., *whose* actions, suits, debts, etc., by such guileful, covinous, or fraudulent devices and practices as aforesaid, are, or shall be or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, and of none effect." The sixth section of the same statute contains a proviso that "this act, or anything therein contained, shall not extend to any *estate or interest* in lands, etc., goods, etc., had, made, conveyed, or assured, which estate or interest is, or shall be, upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or incorporate, not having at the time of such conveyance or assurance to them made, any manner of *notice or knowledge of such covin, fraud, or collusion, as is aforesaid.*"

QUESTIONS

1. Who is a creditor within the meaning of the Statute of Elizabeth against fraudulent conveyances? Is a person, who has not reduced his claim to judgment, a creditor within the meaning of the statute?
2. Does the statute protect future as well as existing creditors?
3. How does the creditor proceed in taking advantage of the power afforded him by the statute?
4. D transfers his property to X with intent to hinder, delay, and defraud his creditors. The creditors are not objecting. Is the conveyance valid between D and X? Is it valid between D and third persons other than creditors?
5. X is the owner of ten shares of stock in a corporation which he has not paid for. The corporation, with intent to defraud its creditors, releases X from his liability to pay for the stock. What are the rights of the creditors of the corporation?

GREENWALD *v.* WALES

174 New York Reports 140 (1903)

Appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 22, 1902, modifying, and affirming as modified, a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial.

CULLEN, J. The action is in replevin to recover a stock of goods seized by the appellant as sheriff of Broome County on an attachment issued against the property of Chester M. Hapgood, the respondents' vendor. It appears by the evidence that the plaintiffs, under the name of the Manhattan Purchasing Syndicate, were in the business of purchasing stocks of goods in various parts of the country, shipping them to New York, and there selling them at auction. Their vendor in the present case, Hapgood, was at the time of the sale carrying on a retail store for the sale of ladies' and gentlemen's furnishing goods in the city of Binghamton, in this state. The respondents' attention was called to the desire of Hapgood to sell out his stock through a broker in that business. One of their number, Greenwald, went to Binghamton on Saturday, December 15, 1899, and examined the stock in the store in which Hapgood was then doing business. Greenwald testified that it would cost about six thousand dollars to replace the goods then in stock at wholesale prices, but that for the purpose of an auction sale they were worth much less than that sum. After some bargaining the plaintiffs agreed to buy the stock for $2,700 and paid Hapgood $500 on account. On the Tuesday following, Greenwald returned to Binghamton and under his direction the goods were placed in packing boxes and taken to the Erie railroad station for shipment to New York City. While there, they were seized by the sheriff under the attachment heretofore mentioned. When Greenwald returned to Binghamton, he brought a certfied check for $2,200, the remainder of the purchase money. Much discussion occurred between the parties as to the payment of this sum. Greenwald insisted that he should not be required to make the payment until the goods had been packed up and delivered at the railroad station. To this Hapgood refused to accede. A witness present on the occasion testified that in this negotiation Greenwald threatened that he could close the store by notifying Claflin and Company, Calhoun and Robbins, and other New York merchants, of Hapgood's intended sale. Greenwald did not deny this conversation. The most he would

say was that he did not recollect whether he said or did not say the words imputed to him. He concedes that he urged that the final payment should not be made until the goods had been packed up and delivered at the station. Hapgood, however, maintained his position and the check was delivered to him. He collected it from the bank and absconded. At the time, he was indebted to the New York merchants mentioned and others in a sum in excess of $3,000. The character and details of this transaction tended to cast very grave doubts on the good faith of the plaintiffs. The issue, however, was one of fact for the jury, and the only question before us is the correctness of the court's instructions to the jury.

It would not be profitable to review in detail the charge of the learned trial judge. Each party presented a great number of requests. Several of those presented by the plaintiffs and charged by the court stated the law too favorably to them. The charge of the trial judge in a case of this character should, however, be viewed as a whole, and it may be that in most of the instances referred to, the errors, if such they were, were cured by subsequent instructions to the jury, made either of the court's own volition or in answer to request by the defendants. But there was at least one instruction to the jury which was vital in its character, going to the kernel of the case, which does not seem to have been limited or modified in any other part of the charge. To the request of the plaintiffs to charge that "The fact that the plaintiffs knew that by the sale of the goods Hapgood's creditors would be deprived of the means of collecting their debts is no evidence of fraud, and does not affect either title or ownership of the property," the court charged: "That, gentlemen, is so; all the law requires is that the plaintiff should not be a party to an intended fraud on the part of Hapgood; I so charge you." We think this instruction clearly erroneous. The request involves the assumption that the plaintiffs might know, not only that by the sale the goods sold would not longer be subject to seizure by the creditors, which, of course, would be the effect of any sale, but that thereby the creditors would be deprived from collecting their claims either by resort to the consideration paid for the sale or otherwise. It seems, therefore, to be in effect that though the plaintiffs might know that their vendor was by the sale about to place all his property beyond the reach of his creditors, still as long as the plaintiffs' object was only to secure a good bargain for themselves they could make the purchase with impunity. This is made more apparent by another portion of the charge,

where the court said, "That the plaintiffs had a right to purchase those goods and to take them and receive them if they took them in good faith, and without any intent on their part to cheat or defraud the creditors of Hapgood." This is not the law. By section 24, Personal Property Law (Laws of 1897, chap. 417), every assignment or transfer of goods or things in action, with intent to hinder, delay, or defraud creditors, is void as to such creditors. By section 29 it is enacted that the provision cited shall not affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intention of his grantor. To bring himself within the saving clause of the statute it is necessary that the purchaser should have no notice of his vendor's fraudulent purpose. If he has such knowledge it will not protect his title that he was not interested in the fraudulent purpose of his grantor, but sought solely in his own interest a profitable purchase. "The fact of the payment of a valuable consideration upon a transfer of property is not, as a proposition of law, inconsistent with the existence of an intent to defraud." (*Billings* v. *Russell*, 101 N.Y. 226.) In *Starin* v. *Kelly* (88 N.Y. 421) it is said by JUDGE EARL:

> Under the statute a creditor assailing a transaction of property as fraudulent may succeed by simply showing a fraudulent intent on the part of the vendor, or such intent on the part of the vendee. If, however, the vendee shows that he paid a valuable consideration for the property transferred to him, then proof of the fraudulent intent of the vendor only is not sufficient; then there must be proof, also, of a fraudulent intent on the part of the vendee, or that he had notice of the vendor's fraudulent intent.

It was therefore sufficient to render the sale void as to the defendant, who represented an attaching creditor, that the plaintiffs had notice or knowledge of their vendor's fraudulent intent, even though they may not have participated therein.

The presumption is that a man intends the natural consequences of his act. If the effect of the sale by the plaintiffs' vendor was to deprive his creditors of the means of collecting their debts, it might be presumed in the absence of other motive or inducement that his intention was to accomplish that object, and if the plaintiffs had knowledge that this was to be the result, it was for the jury to say whether such knowledge did not give them notice that Hapgood's intent was fraudulent.

The judgment should be reversed and new trial granted, costs to abide the event.

QUESTIONS

1. D, with intent to hinder, delay, and defraud his creditors, makes a gift of $5,000 to X. X accepts the gift in good faith without notice of D's intent. What are the rights of D's creditors, if any, against X?
2. D, indebted to C and others but not actually insolvent, makes a gift of $5,000 to X. Shortly thereafter D becomes insolvent. What are the rights, if any, of the creditors against X?
3. D, with intent to hinder, delay, and defraud his creditors, sells all of his property to X. X pays value for the property without notice of D's state of mind. What are the rights of D's creditors, if any, against X?
4. X, before he has paid all of the purchase price agreed upon, is apprised of D's state of mind. Discuss the validity of the sale.
5. X pays value for the property but does so with knowledge of D's state of mind. Discuss the validity of the transaction.
6. D, knowing that he is insolvent, sells his property to X. Discuss the validity of the sale.
7. D sells his property to X but retains possession of it with the consent of X. Discuss the validity of the transaction.
8. D sells his property to X at a price considerably below its real value. Discuss the validity of the transaction.
9. D executes a chattel mortgage on his stock in trade to X to secure a trade debt. X does not record the mortgage for fear of injuring D's credit. C thereafter extends credit to D. C gets a judgment on his claim. Y, a constable under a writ of attachment, seizes the property in question. X sues Y in replevin for the property. What decision?

BRIGGS *v.* BOSTON AND LOWELL RAILROAD COMPANY

88 Massachusetts Reports 246 (1863)

The defendant transported flour consigned to the plaintiff. The plaintiff failed and refused to pay the freight charges upon arrival of the flour, and the defendant held it under his lien for the charges. The flour, being about to spoil, was sold by the defendant, and the proceeds of the sale were retained by him. The plaintiff brings this action in trover for the value of the goods. Judgment was rendered for the plaintiff in the superior court for the amount received by the defendant on the sale, less the amount of the charges for which the defendant had a lien and the expenses of the sale. The defendant appeals.

MERRICK, J. When the flour had been carried over their road to Wilmington and deposited at that place in their warehouse, the defendant had a lien upon it for all the freight charges which had been earned

in its transportation from Racine. But this gave them only a right to retain it until they were paid; not to sell it to obtain the remuneration to which they were entitled. In *Lickbarrow* v. *Mason*, 6 East, 21, it is said by the court that an owner may sell or dispose of his property as he pleases; but he who has a lien only on goods has no right to do so; he can only detain them until payment of the sum for which they are chargeable. And the rule which is now well established, that a party having a lien only, without a power of sale superadded by a special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all other persons having like claims upon property in their possession. *Jones* v. *Pearle*, 1 Strange, 556; *Doane* v. *Russell*, 3 Gray, 382. It is in distinct recognition of this principle that the legislature has provided that when the owner or consignee of fresh meat, and of certain other enumerated articles soon to perish for want of care, shall not pay for the transportation and take them away, common carriers who have a lien thereon for the freight may sell the same without any delay and hold the proceeds, subject to their own lawful charges, for the use of the owner. And such also is the provision in relation to trunks, parcels, and passengers' effects left unclaimed at any passenger station for six months after arrival and deposit therein. This enumeration of particular cases, in which the right to sell and dispose of certain goods and chattels transported is conferred upon common carriers, operates, according to a familiar rule of law, as a denial or exclusion of their right in all other instances.

None of the provisions of the statute referred to extends to the case of flour transported in barrels as an article of merchandise. And therefore the defendant had no authority under the statute and no right at law to sell the flour which belonged to the plaintiff, although they had a valid and subsisting lien on it and were unable to find, after diligent inquiry, where the person to whom it ought to be delivered resided or had his place of business, and there was danger of its becoming worthless by longer detention of it in their warehouse. Consequently the sale which they made was an unlawful conversion of it to their own use, which renders them liable in an action of tort to the owner for its value, or rather for the value of all the right and interest which he at that time had in it, which is the merchantable value less the amount of the lien upon it.

Plaintiff, therefore, may maintain this action and is entitled to recover as damages the balance left after deducting from the sum

which was the fair merchantable value of the flour at the time of its conversion the amount for which, under the principles before stated, the defendant had a lien upon it, with interest from the time of demand or the date of the writ. And as the sale was unlawful, the expenses incurred in making it cannot be proved for the purpose of diminishing the damages which the plaintiff ought to recover.

Judgment for plaintiff.

QUESTIONS

1. What is the essence of a lien? In what way or ways does the lien of the creditor usually come into existence?
2. D borrows $500 from P and pledges 10 shares of stock with P to secure the debt. D fails to pay the debt when it matures. How can P realize on D's property in satisfaction of his claim?
3. P sells a consignment of goods to D on credit and retains possession of the goods to secure the payment of the purchase price. In the event that D fails or refuses to pay for the goods, what remedies are open to P?
4. Does the court in the principal case really deny that a creditor, having a lien upon the goods of his debtor, has the power to sell the goods in satisfaction of his claim?
5. Statutes generally provide that a creditor, having a lien upon the goods of his debtor, may sell the goods and reimburse himself from the proceeds of the sale. What are the usual requirements laid down by such statutes governing such sales?
6. What is the nature of the right of stoppage *in transitu?* Under what circumstances can a creditor assert this right?
7. When does the right of stoppage *in transitu* arise? When does it terminate? Precisely what steps must the creditor take in the assertion of the right?
8. Having stopped the goods *in transitu*, how may the seller deal with them?

DUPUY *v.* GIBSON

36 Illinois Reports 197 (1864)

Walker, C. J. This was a bill in equity, filed to foreclose a chattel mortgage. It makes the mortgagor and subsequent incumbrancers parties. It prays a foreclosure and sale of the property. A demurrer was filed to the bill, which was overruled by the court. Afterward a motion was entered to dismiss the bill for want of equity, when complainant entered a cross-motion for leave to amend the bill.

The latter motion was overruled and the former allowed, and the bill was dismissed at complainant's costs.

The main question in the case is whether a bill can be entertained to foreclose a mortgage on personal property. There are numerous cases that hold a bill may be filed to redeem from a pledge or such a mortgage. And such a bill may be maintained even after a condition has been forfeited, if exhibited in a reasonable time. *Brown* v. *Lispcomb*, 9 Port. (Ala.) 475; Story on *Bailment*, section 287. Judge Story, in his work on *Equity Jurisprudence*, Volume II, section 1031, says, in mortgages of personal property, although the condition has not been performed, there exists, as in mortgages of land, an equity of redemption, which the mortgagor may assert if he brings his bill to redeem in a reasonable time. He also says there is a difference between mortgages of land and mortgages of personal property, in regard to the rights of the mortgagees after a breach of condition. In the latter case, there is no necessity to bring a bill to foreclose; but the mortgagee may, upon due notice, sell the property, which will vest the title in the purchaser.

It will be observed that the author only says that it is unnecessary to file a bill to foreclose such a mortgage. He does not say that a bill will not be sustained for that purpose. Whilst it may be that a bill should not be sustained in ordinary cases, where the mortgagee may foreclose by sale without injury to the rights of any person, yet when there are successive liens and incumbrances, it would be eminently proper and promotive of justice that it should be foreclosed in equity. In such a case accounts of all the parties in interest could be readily adjusted and the trust fund equitably distributed among the claimants. In such a case the mortgagor or any junior mortgagees might maintain a bill to settle the rights of all the parties, and for a redemption. And what reason can be assigned why a mortgagee whose debt is due may not maintain a bill to adjust all rights and to foreclose and have the property sold and the fund distributed, and thus cut off a redemption? Such a practice would promote justice, and no reason is perceived why it should not be sanctioned. Property thus situated seems in equity to be a trust fund, and it is certainly better for junior mortgagees to foreclose in this manner than by sale by the senior mortgagee.

We are, however, not prepared to hold that a bill should be entertained in every case. If the amount were small, and there were no adverse claims or other mortgages or liens, no necessity is perceived

why such a bill should be allowed, as the remedy by notice and sale of the property affords a sufficient remedy in such a case. But in this case there are several parties claiming liens and to be the owners of the property, which is considerable in amount, and we think justice will be advanced and litigation prevented by entertaining the bill and foreclosing the equity of redemption, in selling the property and applying the proceeds in discharge of the equitable liens existing upon the property, according to their priority.

It may be urged that the mortgagee may foreclose by sale of the property. So may a trustee of lands conveyed to secure a debt, or a mortgagee with power of sale contained in the deed. Yet a court of equity will, in these cases, sustain a bill to foreclose, under its general equity jurisdiction over trusts. And if the property in controversy should sell for more than will satisfy complainant's mortgage, the subsequent incumbrances and intervening equities are severally entitled to the surplus. Again, equity can afford in this case more ample relief and can do more complete justice than can be obtained in a court of law. For these reasons we are of the opinion that the court below erred in dismissing the bill, and the decree must be reversed and the cause remanded.

Decree reversed.

QUESTIONS

1. What is a chattel mortgage? How does a chattel mortgage differ from a pledge? Does a chattel mortgage give the creditor more security than a pledge?
2. What is meant by the foreclosure of a mortgage? What is the legal effect of a foreclosure?
3. In what different ways may a chattel mortgage be foreclosed?
4. Chattel mortgage commonly contains a power authorizing the mortgagee to sell the mortgaged property and to reimburse himself from the proceeds in case of default by the mortgagor. Does the mortgagee enjoy such a power in the absence of express authorization in the mortgage?
5. What must be the character of the sale in those cases in which the mortgagee does enjoy a power of sale?
6. What is a real property mortgage? In what different ways may a real property mortgage be foreclosed?
7. May the mortgagee of real property sell the property and reimburse himself from the proceeds upon default of the mortgagor, in the absence of an express authorization to do so?
8. A mortgage is foreclosed and the property is sold. The proceeds are insufficient to pay the mortgage debt. Is the debt discharged? If not, what steps may the creditor thereafter take?

CHAPTER IV

PRIVILEGES OF DEBTORS

A

It has already been pointed out that the debtor-creditor relation is a two-sided relation. Thus far attention has chiefly been directed to the consideration of the position of the creditor; but along with the rights and powers of creditors which arise out of the use of the specialized credit-raising devices, arises also a group of privileges and immunities of debtors. These privileges and immunities of the debtor constitute limitations upon the extent to which the creditor may pursue the defaulting debtor. Such limitations have been developed for a variety of reasons of policy; and they are so important that neither the creditor's nor the debtor's position is set forth in its true relationship without some consideration of them. Under certain circumstances, for example, the debtor is said to be discharged entirely from his obligation; and again, although the law gives the creditor power of realizing upon and satisfying his claim of the debtor's property through the use of certain approved procedure, yet, in practically all cases, certain property of the debtor is held to be immune to all attacks by the creditor, no matter how just or how well established the latter's claim. A brief consideration of the nature and scope of these limitations upon the powers of the creditor constitutes the subject-matter of the present chapter.

MOYNAHAN *v.* MOORE

9 Michigan Reports 9 (1860)

Martin, C. J. Plaintiff employed defendant to repair a carriage, and defendant retained the carriage under a mechanic's lien for the amount due him for making such repairs. To obtain possession of the property the plaintiff tendered sufficient to discharge the lien. This tender necessarily operated to release the property and the plaintiff was entitled to immediate possession of it. That such would be the effect of an unconditional tender is not doubted; but as the

tender was made in this case upon condition that the carriage should be delivered up, it is thought that it has not such effect. A tender made to secure the possession of property can hardly be called conditional because it is accompanied by a demand for the property. But it does not appear that any objection was made by the defendant, except for insufficiency—he demanding more than the sum offered—and as the jury find that sufficient was tendered, the tender was good, even were the strictest rule to prevail upon the well-established principle that an objection at the time of the tender precludes all other, and if that be not well grounded, the tender will be held good.

It is claimed that the want of money in court obviates the effect of the tender. Were this an action by Moore to recover compensation for the repairs, the want of money in court would render the tender nugatory, as the effect of tender in such cases is to stay interest and to relieve from costs, and therefore the party making the tender must always have the money within the reach of the creditor. But in this case, the tender having once operated to discharge the lien, it was gone forever, and nothing could revive it. The reasons which require the money to be brought into court do not apply in such a case. By refusing to receive the money tendered the defendant lost his lien, and can only rely upon the personal liability of the plaintiff.

Judgment reversed and a new trial granted.

QUESTIONS

1. What was the nature of the action brought by the plaintiff in this case? What relief did he ask for?
2. What would have been the decision of the court if the defendant, under the facts of the principal case, had been suing the plaintiff for the sum due the defendant for his services?
3. D owes P $500. D offers $500 in gold in payment of the debt which P refuses to accept because, as he claims, the debt is $550. What is the legal effect of D's offer?
4. D owes P $500. D offers in payment of the claim X's check for $500. P admits that the debt is $500 but refuses to accept X's check in payment of it. What is the legal effect of D's offer?
5. P holds a mortgage on D's land to secure a debt of $5,000 which D owes P. D offers $5,000 in legal tender in payment of the debt which P refuses to accept. What is the legal effect of D's offer?

JONES *v.* JONES

18 Alabama Reports 248 (1850)

Assumpsit by plaintiff against defendant in error for money paid, laid out, and expended for his use. The statute of limitations of the state of Georgia, in which the contract was made and in which the defendant has since resided, was relied upon as a defense. The court charged the jury that if they believed that defendant resided in Georgia six years after the accrual of the cause of action and before his removal to this state, the statute of limitations of Georgia would bar this action. To this charge plaintiff excepted.

Dargan, C. J. There is one question in this case which, if decided in favor of the plaintiff, will render the examination of the others unnecessary. It is this: Admitting that the statute of limitations of Georgia would be a bar to an action on this contract, if brought in that state, will it avail the defendant, the suit being brought in Alabama?

It is a principle of law admitted by all courts that the *lex loci contractus* must govern as to the validity, interpretation, and construction of the contract. But the remedy to enforce it, or to recover damages for its breach, must be pursued according to the law of the forum where the suit is brought. (Story, *Conflict of Laws*, secs. 275–76.) Guided by these plain rules, which can be denied by no one, to my mind it seems plain that where the law of another state is relied on as a defense brought in this state, it must be shown that, according to the *lex loci contractus*, the contract was invalid, or, if once valid, that it has become extinguished and, therefore, is not in legal contemplation a contract. If the foreign law does not affect the contract itself, but only the remedy to enforce it, we cannot regard it; for all remedies on contracts, whether made in or out of this state, must be governed by our own laws, when suit is brought here, without regard to the remedies afforded by the laws of other countries. Applying this test to the question there can be but one answer given, if we are to be guided by the settled principles of law; for all the authorities agree that the statute of limitations, even when the bar is perfected, does not annul the contract itself, but only takes away the remedy provided by law for its enforcement. Now if the contract itself is not discharged, but the remedy alone is taken away, how can we refuse to allow a remedy, the contract being valid merely because there is no remedy in the state where the contract was made? To refuse a

remedy on such a contract would not be to interpret the contract by the *lex loci* only, but it would be to govern ourselves by the law of other countries in regard to the remedies allowed for the purpose of enforcing contracts.

We apprehend that no one can doubt but that the statute of limitations, when applied to a personal contract, acts only upon the remedy and not upon the contract. For instance, though a debt may be barred by the statute, yet it is well settled that if there is a lien to secure its payment the lien may be enforced, but if the statute acted upon the debt itself, as well as the remedy, and extinguished both, it might well be asked how the lien could be enforced. The debt is the principal, the lien is the incident and dependent upon the debt for its existence, and if the debt be extinguished, how can the lien survive? To my mind they exist together, and when the principal is gone on which the incident depends, the incident must go with it. It is true, if the lien existed by way of mortgage, the mortgagee might insist on his legal title to the thing mortgaged and bring his action at law without regard, perhaps, to the legal existence of the debt, but could he file his bill in equity to have the thing sold, if he had no debt? Or if the lien was a mere equity, could he obtain satisfaction of his debt after it was by operation of law extinguished, unless the same law that extinguished the debt preserved the lien? Our own decisions furnish the answer to these questions: It is that the statute of limitations only bars the remedy and does not affect the debt itself. The debt, therefore, still existing, the lien can be enforced for its satisfaction. We are compelled to hold that the statute, when applied to contracts for the payment of money, takes away the legal remedy alone, not affecting the debt itself.

Therefore, it follows that the court erred in its instructions, and the judgment must be reversed and the cause remanded.

QUESTIONS

1. By statute in Illinois it is provided that "actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." It is further provided by the same statute that "actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evi-

dences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." What is the policy of such legislation?

2. What is the legal effect of the creditor's failure to bring his action within the time stated by the law?
3. After action has been barred by the statute on a certain debt, the debtor makes a promise, unsupported by any consideration, to pay the claim. What is the effect of the promise?
4. D executes and delivers a promissory note to P. D is absent from the state continuously for ten years after the maturity of the note. What decision in an action by P against D on the note after his return to the state in question?
5. Precisely what does the court decide in the principal case? Does the conclusion of the court in this case seem consistent with the spirit and purpose of the statute of limitations?

GROVER *v.* WAKEMAN

11 Wendell's New York Reports 187 (1833)

SUTHERLAND, J. Having thus settled the character and construction of the assignment, the question recurs whether it is void on account of the condition on which it makes the preference given to the creditors of the second class to depend, to wit, an absolute discharge of their debts. It is perfectly well settled, both in England and in this country, that a debtor in failing circumstances has a right to prefer one creditor or set of creditors to another in all cases not affected by the operation of a bankrupt system. He may assign the whole of his property for the benefit of a single creditor in exclusion of all others, or he may distribute it in unequal proportions, either among a part or the whole of his creditors. No matter how or upon what principles the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision. 3 M. & S. 371; 4 Mason, 210; 5 T. R. 235; 4 East, 1; 15 Johns. R. 583.

The right to prefer may originally have been sustained in part upon the supposition that just and proper grounds of preference did in most cases exist, and would be duly regarded by the debtor; but whatever may have been the reason or foundation of the rule, it is one of that numerous class of cases in which the rule has become absolute, without any regard to the fact whether the reason on which

it was founded exists or not in the particular cases. It is now too late to agitate the question whether those assignments, either partial or general, are sustained by considerations of true wisdom and policy. Reflecting men have differed upon that subject; but the better opinion seems to be, that in the absence of a general bankrupt system, the interests of a commercial community require that they should be sustained. They have accordingly grown into use and have been sanctioned by judicial decisions in most of the states of the union. They have become thoroughly incorporated into our system; and all that is now competent for our courts to do is to see that they fairly appropriate all the insolvent's property, or so much of it as he undertakes to assign, to the payment of his just debts, and are not made the instrument of placing it beyond the reach of his creditors and for the benefit, either immediate or remote, of the insolvent himself. Whenever they depart from the simplicity of a direct and unequivocal devotion of the property of the assignor to the payment of his debts, and contain reservations and conditions intended for his ease and advantage, they are viewed with considerable, and I think I may add in view of the course of judicial decisions in this state, with increasing distrust.

QUESTIONS

1. X, in financial difficulties, transfers all of his property to T, to be distributed among certain of X's creditors. C and other creditors, for whom no provision is made in the assignment, ask that it be set aside on the ground that it is in fraud of creditors. What decision?
2. In the foregoing case it is provided in the deed of assignment that the property shall be divided only among those creditors who will agree to release X from further liability for his debts. Creditors of X ask that the assignment be set aside on the ground that it is in fraud of creditors. What decision?
3. X transfers his property to T, with directions that T shall continue the business and discharge X's debts as rapidly as possible. Creditors of X ask that the assignment be set aside. What decision?
4. What is the legal effect of an assignment as to creditors who do not participate in the distribution of the debtor's assets?
5. What is the legal position of the assignee under an assignment for the benefit of creditors? What powers does he enjoy? What duties does he owe?
6. What weaknesses appear in the general assignment as a device for securing a just and equitable distribution of the debtor's assets among his creditors?

7. In many states statutes have been passed regulating the conditions under which assignments for the benefit of creditors may be made. Examine the statutes of some state in which you are interested, and make a brief digest of any such laws that you may find.
8. Under the Bankruptcy Act an assignment by a debtor for the benefit of his creditors, even though the debtor is solvent at the time, is an act of bankruptcy. Why should this be so?

HANOVER NATIONAL BANK *v.* MOYSES

186 United States Reports 181 (1901)

FULLER, C. J. By the fourth clause of section eight of article 1 of the Constitution the power is vested in Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." This power was first exercised in 1800. In 1803 that law was repealed. In 1841 it was again exercised by an act which was repealed in 1843. It was again exercised in 1867 by an act which, after being several times amended, was finally repealed in 1878. And on July 1, 1898, the present act was approved.[1]

The act of 1800 applied to "any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying or selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurance," and to involuntary bankruptcy.

In *Adams* v. *Storey*, 1 Paine, 79, JUSTICE LIVINGSTON said on circuit: "So exclusively have bankrupt laws operated on traders, that it may well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject." But this doubt was resolved otherwise, and the acts of 1841 and 1867 extended to persons other than merchants and traders, and provided for voluntary proceedings on the part of the debtor, as does the act of 1898.

It is true that from the first bankrupt act passed in England, 34 and 35 Henry VIII, c. 4, to the days of Queen Victoria, the English bankrupt acts applied only to traders, but, as JUSTICE STORY, in his *Commentaries on the Constitution*, pointed out, "this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to

[1] See Appendix F, p. 655, for extracts from the Bankruptcy Act of 1898.

prevent their being applied to any other class of unfortunate and meritorious debtors." Section 1113.

The whole subject is reviewed by that learned commentator in chapter xvi, sections 1102–15 of his works, and he says in respect of "what laws are to be deemed bankrupt laws within the meaning of the Constitution":

Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said, that laws which merely liberate the person of the debtor, are insolvent laws, and, those which discharge the contract, are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. Again, it has been said, that insolvent laws act on imprisoned debtors only at their own instance; and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate who were to be deemed in a legal sense insolvents, or bankrupts. And if an act of Congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this point be warranted in saying that the act was unconstitutional, and the commission a nullity.

QUESTIONS

1. Why was it thought desirable by the framers of the Constitution that the power over bankruptcy should be vested in the national government?
2. "The purpose of bankruptcy legislation is twofold: (*a*) to provide for an equitable distribution of the assets of the debtor; (*b*) to protect unfortunate and meritorious debtors." Why should the state be interested in protecting "unfortunate and meritorious debtors"?
3. Why should a distinction be made between voluntary and involuntary bankruptcy?
4. Who may become a voluntary bankrupt? Under what circumstances may such persons become voluntary bankrupts?
5. What persons may be forced into involuntary bankruptcy? Why should not all persons be subject to involuntary bankruptcy?
6. For what reasons may debtors be thrown into involuntary bankruptcy?
7. Who may file a petition seeking to force a debtor into involuntary bankruptcy?
8. Must it appear that a person is insolvent before he can become a voluntary bankrupt? Before he can be forced into involuntary bankruptcy?

9. What constitutes insolvency within the meaning of the federal Bankruptcy Act?
10. Section 6 of the Bankruptcy Act provides that "this act shall not affect allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." Does not this provision result in a lack of uniformity in the application of the Bankruptcy Law? If so, is not the Bankruptcy Act unconstitutional?
11. What justification is there for state exemption laws? If a person owes a debt, why should not all of his property be available for the payment of it?

In re MARSHALL PAPER COMPANY

102 Federal Reporter 872 (1900)

Colt, Cir. J. This appeal and petition relate to orders or decrees entered by the district court in the matter of the Marshall Paper Company, bankrupt. The question raised is whether the order of the district court refusing to grant the petitioner a discharge was proper.

The district court based its decision on two grounds: First, it doubted, at least in some cases, whether a corporation was entitled under the Act to a discharge; second, it held that the court could refuse a discharge for causes other than those mentioned in section 14 of the Act, and it declined to grant a discharge in the present case by reason of the injurious effect it might have upon the creditors' right to enforce the secondary liability of the directors of the corporation under the Massachusetts statute.

We think a corporation is entitled to a discharge under the Bankruptcy Act of 1898. The Bankruptcy Act of 1867 expressly excepted corporations from the right to a discharge. This exception was retained in the earlier drafts of the present Act, but it was stricken out before the Act became a law.

The bankrupt, under section 14, is entitled to a discharge as a matter of right, provided he has not committed any of the offenses therein enumerated. Section 14b reads as follows:

> The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at

such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

By this provision the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the described offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, "investigate the merits of the application," must be taken in connection with the context. To construe these words as if they stood alone and disconnected with what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such causes exist.

A discharge releases only the bankrupt's personal liability. In accordance with this underlying principle, section 16 of the act provides:

"The liability of a person who is a co-debtor with, or guarantor or in any manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

The theory of a discharge, as well as this express provision of the act, forbids that the secondary liability of the directors of a corporation, under the Massachusetts statute, should be affected by the corporation's discharge in bankruptcy.

The petitioning corporation having duly filed its application for a discharge under section 14, and not having been adjudged guilty of any of the offenses therein mentioned, we are of the opinion that it was entitled to a discharge.

Decree refusing discharge reversed, with an order to enter decree discharging the Marshall Paper Company.

QUESTIONS

1. In bankruptcy proceedings what debts, in general, may be proved against the debtor?
2. In what manner are creditors notified of bankruptcy proceedings? What is the effect of an adjudication of bankruptcy upon the claim of a creditor who has not been given proper notice of the proceedings?
3. Who may file a petition against a debtor to force him into bankruptcy? How many creditors must join in the petition?
4. What control does the debtor have over his property and affairs after a petition for involuntary bankruptcy has been filed against him and before a trustee has been selected?
5. In what manner can creditors protect themselves against fraudulent dealings with the property by the debtor after the petition has been filed and before a trustee has been appointed?
6. At what stage in the proceedings is the trustee selected? How is he selected? What control over the property and affairs of the debtor does he enjoy? What are his duties in connection with the administration of the debtor's estate?
7. When and under what circumstances is the debtor entitled to a discharge in bankruptcy?
8. What is the effect of a discharge in bankruptcy?
9. What is the effect of a promise after the discharge by the debtor to pay discharged debts?

APPENDIX A

UNIFORM SALES ACT[1]

PART I

FORMATION OF THE CONTRACT

SECTION 1. *Contracts to sell and sales.* (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. (2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. (3) A contract to sell or a sale may be absolute or conditional. (4) There may be a contract to sell or a sale between one part owner and another.

SEC. 2. *Capacity—liability for necessaries.* Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

FORMALITIES OF THE CONTRACT

SEC. 3. *Form of contract or sale.* Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

SEC. 4. *Statute of frauds.* (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive the

[1] The draft of an "Act to Make Uniform the Law of Sales" prepared by Professor Samuel Williston, of Harvard University, at the request of the National Conference of Commissioners on Uniform State Laws. The draft was adopted by the Commissioners in 1904 and recommended to the various states for enactment. It has been adopted by the territory of Alaska and by the following states: Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Wisconsin, Wyoming, and Tennessee.

same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf. (2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. (3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

SUBJECT-MATTER OF CONTRACT

SEC. 5. *Existing and future goods.* (1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods." (2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. (3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

SEC. 6. *Undivided shares.* (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares. (2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass, and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass, and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

SEC. 7. *Destruction of goods sold.* (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller, have wholly perished at the time when the agreement is made, the agreement is void. (2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed

in character, the buyer may at his option treat the sale (*a*) as avoided, or (*b*) as transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

SEC. 8. *Destruction of goods contracted to be sold.* (1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided. (2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish, or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract (*a*) as avoided, or (*b*) as binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

THE PRICE

SEC. 9. *Definition and ascertainment of price.* (1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties. (2) The price may be made payable in any personal property. (3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply. (4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

SEC. 10. *Sale at a valuation.* (1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract of the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. (2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

CONDITIONS AND WARRANTIES

SEC. 11. *Effect of conditions.* (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, or he

may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty. (2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

SEC. 12. *Definition of express warranty.* Any affirmation of fact, or any promise of the seller relating to the goods, is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty.

SEC. 13. *Implied warranties of title.* In a contract to sell, or a sale, unless a contrary intention appears, there is: (1) an implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass; (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of sale; (3) an implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made. (4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

SEC. 14. *Implied warranty in sale by description.* Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

SEC. 15. *Implied warranties of quality.* Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell, or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller, the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods

shall be of merchantable quality. (3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose. (5) An implied warranty or condition as to quality of fitness for a particular purpose may be annexed by the usage of trade. (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

SALE BY SAMPLE

SEC. 16. *Implied warranties in sale by sample.* In the case of a contract to sell, or a sale by sample: (*a*) There is an implied warranty that the bulk shall correspond with the sample in quality. (*b*) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3). (*c*) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination and sample.

PART II

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

SEC. 17. *No property passes until goods are ascertained.* Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

SEC. 18. *Property in specific goods passes when parties so intend.* (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

SEC. 19. *Rules for ascertaining intention.* Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time. (2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer (*a*) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (*b*) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made. (2) Where, in pursuance of a contract of sale, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery," or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

SEC. 20. *Reservation of right of possession or property when goods are shipped.* (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer. (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the

property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract. (3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer. (4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

SEC. 21. *Sale by auction.* In the case of a sale by auction (1) where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale. (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid, and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. (3) A right to bid may be reserved expressly by or on behalf of the seller. (4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

SEC. 22. *Risk of loss.* Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk, whether delivery had been made or not, except that (*a*) where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such

delivery. (*b*) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

TRANSFER OF TITLE

SEC. 23. *Sale by a person not the owner.* (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. (2) Nothing in this act, however, shall affect (*a*) the provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; (*b*) the validity of any contract to sell or sale under any special common-law or statutory power of sale or under the order of a court of competent jurisdiction.

SEC. 24. *Sale by one having a voidable title.* Where the seller of goods has a voidable title thereto, but his title has not been voided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

SEC. 25. *Sale by seller in possession of goods already sold.* Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

SEC. 26. *Creditors' rights against sold goods in seller's possession.* Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

SEC. 27. *Definition of negotiable documents of title.* A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title.

SEC. 28. *Negotiation of negotiable documents by delivery.* A negotiable document of title may be negotiated by delivery (*a*) where, by the terms of the document, the carrier, warehouseman, or other bailee issuing the same, undertakes to deliver the goods to the bearer; or (*b*) where, by the terms of the document, the carrier, warehouseman, or other bailee issuing the same, undertakes to deliver the goods to the order of a specified person, and

such person or a subsequent indorsee of the document has indorsed it in blank or to bearer. Where, by the terms of a negotiable document of title, the goods are deliverable to bearer, or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the documents shall thereafter be negotiated only by the indorsement of such indorsee.

SEC. 29. *Negotiation of negotiable documents by indorsement.* A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the document, deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner.

SEC. 30. *Negotiable documents of title marked "not negotiable."* If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable," or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

SEC. 31. *Transfer of non-negotiable documents.* A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated, and the indorsement of such a document gives the transferee no additional right.

SEC. 32. *Who may negotiate a document.* A negotiable document of title may be negotiated (*a*) by the owner thereof; or (*b*) by any person to whom the possession or custody of the document has been intrusted by the owner, if, by the terms of the document, the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been intrusted, or if at the time of such intrusting the document is in such form that it may be negotiated by delivery.

SEC. 33. *Rights of person to whom document has been negotiated.* A person to whom a negotiable document of title has been duly negotiated acquires thereby (*a*) such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value; and (*b*) the direct obliga-

tion of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

SEC. 34. *Rights of person to whom document has been transferred.* A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document. Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

SEC. 35. *Transfer of negotiable document without indorsement.* Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

SEC. 36. *Warranties on sale of document.* A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title, unless a contrary intention appears, warrants: (*a*) that the document is genuine; (*b*) that he has a legal right to negotiate or transfer it; (*c*) that he has knowledge of no fact which would impair the validity or worth of the document; and (*d*) that he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

SEC. 37. *Indorser not a guarantor.* The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document, or previous indorsers thereof, to fulfil their respective obligations.

SEC. 38. *When negotiation not impaired by fraud, mistake, or duress.* The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to intrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated

paid value therefor without notice of the breach of duty, or fraud, mistake, or duress.

SEC. 39. *Attachment or levy upon goods for which a negotiable document has been issued.* If goods are delivered to a bailee by the owner, or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them, they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

SEC. 40. *Creditor's remedies to reach negotiable documents.* A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

PART III

PERFORMANCE OF THE CONTRACT

SEC. 41. *Seller must deliver and buyer accept goods.* It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell, or sale.

SEC. 42. *Delivery and payment are concurrent conditions.* Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

SEC. 43. *Place, time, and manner of delivery.* (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not, his residence; but in case of a contract to sell, or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery. (2) Where by a contract to sell, or a sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. (3) Where the goods at the time of sale are in the possession of a

third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf, but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods. (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact. (5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

SEC. 44. *Delivery of wrong quantity.* (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received. (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate. (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. (4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

SEC. 45. *Delivery in instalments.* (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. (2) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed farther and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation but not to a right to treat the whole contract as broken.

SEC. 46. *Delivery to a carrier on behalf of the buyer.* (1) Where, in pursuance of a contract to sell, or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the cases

provided for in section 19, rule 5, or unless a contrary intent appears. (2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit to do so, and the goods are lost or damaged in course of transit the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages. (3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

SEC. 47. *Right to examine the goods.* (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. (3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

SEC. 48. *What constitutes acceptance.* The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

SEC. 49. *Acceptance does not bar action for damages.* In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

SEC. 50. *Buyer is not bound to return goods wrongly delivered.* Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to

the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

SEC. 51. *Buyer's liability for failing to accept delivery.* When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

SEC. 52. *Definition of unpaid seller.* (1) The seller of goods is deemed to be an unpaid seller within the meaning of this act, (*a*) when the whole of the price has not been paid or tendered; (*b*) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise. (2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid or is directly responsible for the price, or any other person who is in the position of a seller.

SEC. 53. *Remedies of an unpaid seller.* (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has (*a*) a lien on the goods or right to retain them for the price while he is in possession of them; (*b*) in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them; (*c*) a right of resale as limited by this act; (*d*) a right to rescind the sale as limited by this act. (2) Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage *in transitu* where the property has passed to buyer.

UNPAID SELLER'S LIEN

SEC. 54. *When right of lien may be exercised.* (1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (*a*) where the goods have been sold without any stipulation as to credit; (*b*) where the goods have been sold on credit,

but the term of credit has expired; (*c*) where the buyer becomes insolvent. (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

SEC. 55. *Lien after part delivery.* Where an unpaid seller has made part delivery of the goods he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

SEC. 56. *When lien is lost.* (1) the unpaid seller of goods loses his lien thereon (*a*) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof; (*b*) when the buyer or his agent lawfully obtains possession of the goods; (*c*) by waiver thereof. (2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

STOPPAGE IN TRANSITU

SEC. 57. *Seller may stop goods on buyer's insolvency.* Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu,* that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

SEC. 58. *When goods are in transit.* (1) Goods are in transit within the meaning of section 57 (*a*) from the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee; (*b*) if the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back. (2) Goods are no longer in transit within the meaning of section 57 (*a*) if the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination; (*b*) if, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent; and it is immaterial that a farther destination for the goods may have been indicated by the buyer; (*c*) if the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf. (3) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer. (4) If part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped *in transitu,* unless such part delivery has been made under such circum-

stances as to show an agreement with the buyer to give up possession of the whole of the goods.

SEC. 59. *Ways of exercising the right to stop.* (1) The unpaid seller may exercise his right of stoppage *in transitu* either by obtaining actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods, or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer. (2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

RESALE BY THE SELLER

SEC. 60. *When and how resale may be made.* (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods *in transitu* may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale. (2) Where a resale is made as authorized in this section, the buyer acquires a good title as against the original buyer. (3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made. (4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer. (5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

RESCISSION BY THE SELLER

SEC. 61. *When and how the seller may rescind the sale.* (1) An unpaid seller having a right of lien or having stopped the goods *in transitu* may rescind the transfer of title and resume the property in the goods, where he

expressly reserved the right to do so in case the buyer should make default or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale. (2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

SEC. 62. *Effect of sale of goods subject to lien or stoppage in transitu.* Subject to the provisions of this act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage *in transitu.*

PART V

ACTIONS FOR BREACH OF THE CONTRACT

REMEDIES OF THE SELLER

SEC. 63. *Action for the price.* (1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods. (2) Where, under a contract to sell, or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it. (3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods

are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

SEC. 64. *Action for damages for non-acceptance of the goods.* (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action against him for damages for non-acceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. (4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no farther therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

SEC. 65. *When seller may rescind contract or sale.* Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

REMEDIES OF THE BUYER

SEC. 66. *Action for converting or detaining goods.* Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

SEC. 67. *Action for failing to deliver goods.* (1) Where the property in the goods has not passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery. (2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. (3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the

difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

SEC. 68. *Specific performance.* Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price, and otherwise as to the court may seem just.

SEC. 69. *Remedies for breach of warranty.* (1) Where there is a breach of warranty by the seller the buyer may, at his election (*a*) accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (*b*) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; (*c*) refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; (*d*) rescind the contract to sell or the sale, and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. (2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted. (3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale. (4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price. (5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53. (6) The measure of damages for breach of warranty is the loss directly and

naturally resulting, in the ordinary course of events, from the breach of warranty. (7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

SEC. 70. *Interest and special damages.* Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where, by law, interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI

INTERPRETATION

SEC. 71. *Variation of implied obligations.* Where any right, duty, or liability would arise under a contract to sell or a sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

SEC. 72. *Rights may be enforced by action.* Where any right, duty, or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

SEC. 73. *Rule for cases not provided for by this act.* In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress, or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

SEC. 74. *Interpretation shall give effect to purpose of uniformity.* This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those states which enact it.

SEC. 75. *Provisions not applicable to mortgages.* The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgages, pledge, charge, or other security.

SEC. 76. *Definitions.* (1) In this act, unless the context or subject-matter otherwise requires "Action" includes counterclaim, set-off, and suit in equity. "Buyer" means a person who buys or agrees to buy goods, of any legal successor in interest of such person. "Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted. "Delivery" means voluntary transfer of possession from one person to another. "Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than

the whole is fixed or ascertainable by computation. "Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document. "Fault" means wrongful act or default. "Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit. "Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale. "Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. "Order," in sections of this act relating to documents of title, means an order by indorsement on the document. "Person" includes a corporation or partnership or two or more persons having a joint or common interest. "Plaintiff" includes defendant asserting a right of set-off or counterclaim. "Property" means the general property in goods, and not merely a special property. "Purchaser" includes mortgagee and pledgee. "Purchases" includes taking as a mortgagee or as a pledgee. "Quantity of goods" includes their state or condition. "Sale" includes a bargain and sale as well as a sale and delivery. "Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person. "Specific goods" mean goods identified and agreed upon at the time a contract to sell or a sale is made. "Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor. (2) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not. (3) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not. (4) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

APPENDIX B

EXTRACTS FROM THE FEDERAL TRADE-MARK ACT[1]

SECTION 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark (*a*) consists of or comprises immoral or scandalous matter; (*b*) consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any state or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any state in the United States prior to the date of the adoption and use by the applicant: *Provided*, That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant: *Provided*, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resembles a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: *Provided*, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act: *Provided further*, That no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing: *And provided further*, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce

[1] Act of Congress, February 20, 1905, 33 United States Statutes at Large, p. 728 *et seq.* The complete text of the Act with amendments will be found in Hopkins on *Trademarks, Tradenames and Unfair Competition*, Appendix E, p. 549 *et seq.*

with foreign nations or among the several states or with Indian tribes which was in actual and exclusive use as a trade-mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February 20, 1905, and if any person or corporation shall have so registered a mark upon the ground of said use for ten years preceding February 20, 1905, as to certain articles or classes of articles to which said mark shall have been applied for said period, and shall have thereafter and subsequently extended his business so as to include other articles not manufactured by said applicant for ten years next preceding February 20, 1905, nothing herein shall prevent the registration of said trade-mark in the additional classes to which said additional articles manufactured by said person or corporation shall apply, after said trade-mark has been used on said article in interstate or foreign commerce or with the Indian tribes for at least one year provided another person or corporation has not adopted and used previously to its adoption and use by the proposed registrant, and for more than one year such trade-mark or one so similar as to be likely to deceive in such additional class or classes: *Provided further*, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof.[1]

SEC. 10. That every registered trade-mark, and every mark, for the registration of which application has been made, together with the application for registration of the same, shall be assignable in connection with the good-will of the business in which the mark is used. Such assignment must be by an instrument in writing and duly acknowledged according to the laws of the country or state in which the same is executed; any such assignment shall be void as against any subsequent purchaser for a valuable consideration, without notice, unless it is recorded in the patent office within three months from date thereof. The commissioner shall keep a record of such assignments.

SEC. 12. That a certificate of registration shall remain in force for twenty years except that in the case of trade-marks previously registered in a foreign country such certificates shall cease to be in force on the day on which the trade-mark ceases to be protected in such foreign country, and shall in no case remain in force more than twenty years, unless renewed. Certificates of registration may from time to time be renewed for like periods on payment of the renewal fees required by this act, upon request by the registrant, his legal representatives, or transferees of record in the patent office, and such request may be made at any time not more than six months prior to the expiration of the period for which the certificates of registration were issued or renewed. Certificates of registration in force

[1] See Act of Congress, March 19, 1920, ch. 104, 41 United States Statutes at Large, p. 533 *et seq.*, for international registration of certain marks, not otherwise registrable, provided for by the convention for the protection of trade-marks and commercial names made and signed in Buenos Aires, August 20, 1910.

at the date at which this act takes effect shall remain in force for the period for which they were issued, but shall be renewable on the same conditions and for the same periods as certificates issued under the provisions of this act, and when so renewed shall have the same force and effect as certificates issued under the provisions of this act, and when so renewed shall have the same force and effect as certificates issued under this act.

SEC. 16. That the registration of a trade-mark under the provisions of this act shall be prima facie evidence of ownership. Any person who shall without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use or shall have used such reproduction, counterfeit, copy, or colorable imitation in commerce among the several states or with a foreign nation or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

SEC. 20. That in any case involving the right to a trade-mark registered in accordance with the provisions of this act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this act by any circuit court of the United States, or by a judge thereof, may be served on the parties against whom such injunction may be granted anywhere in the United States where they be found, and shall be operative, and may be enforced by proceedings to punish for contempt or otherwise, by the court by which such injunction was granted, or by any other circuit court or judge thereof in the United States, or by the Supreme Court of the District of Columbia, or a judge thereof. The said courts or judges thereof shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the circuit court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said

court a certified copy of all the papers on which the said injunction was granted that are on file in this office.

SEC. 21. That no action or suit shall be maintained under the provisions of this act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate of registration fraudulently obtained.

SEC. 28. That is, it shall be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words "Registered in U.S. Patent Office," or abbreviated thus, "Reg. U.S. Pat. Off." or when, from the character or size of the trade-mark, or from its manner of attachment to the article to which it is appropriated, this cannot be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement and continued the same after such notice.

APPENDIX C

EXTRACTS FROM THE CLAYTON ACT[1]

2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise from selecting their own customers in bona fide transactions and not in restraint of trade.

3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in contro-

[1] Act of Congress, October 15, 1914, c. 323, 38 United States Statutes at Large, pp. 730–40.

versy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

11. The authority to enforce compliance with sections 2, 3, 7, and 8 of this act by the person respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce.

APPENDIX D

EXTRACTS FROM THE FEDERAL TRADE COMMISSION ACT[1]

1. That a commission is hereby created and established, to be known as the Federal Trade Commission, which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party.

5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competing in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in the complaint. Any person, partnership, or corporation may make application and upon good cause shown may be allowed by the commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

[1] Act of Congress, September 26, 1914, c. 311, 38 United States Statutes at Large, pp. 717–24.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

Such proceedings in the Circuit Court of Appeals of the United States shall be given precedence over other cases pending therein, and shall in every way be expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

6. That the commission shall also have power:

a) To gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

b) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, to make investigations, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the attorney-general it shall be its duty to make such investigation. It shall transmit to the attorney-general a

report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

c) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation.

d) Upon the application of the attorney-general to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

e) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

f) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act.

g) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

APPENDIX E

UNIFORM NEGOTIABLE INSTRUMENTS ACT[1]

TITLE I

NEGOTIABLE INSTRUMENTS IN GENERAL

ARTICLE I—FORM AND INTERPRETATION

SECTION 1. An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

SEC. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid (1) with interest; or (2) by stated instalments; or (3) by stated instalments with a provision that upon default in payment of any instalment or of interest the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity.

SEC. 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

SEC. 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

[1] The draft of the Uniform Negotiable Instruments Act, prepared by Mr. John J. Crawford, of the New York Bar, was submitted to the Conference of the Commissioners on Uniform State Laws in 1896 for consideration. The draft with amendments was adopted by the Commissioners and recommended to the various states for passage. It has been made law in all states, territories, and possessions of the United States except in Georgia, Texas, and Porto Rico.

SEC. 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal.

SEC. 6. The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

SEC. 7. An instrument is payable on demand (1) where it is expressed to be payable on demand, or at sight, or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

SEC. 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer, or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

SEC. 9. The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or (3) when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank.

SEC. 10. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.

SEC. 11. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

SEC. 12. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent

purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

SEC. 13. Where an instrument expressed to be payable at a fixed period after date is issued, undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not void the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

SEC. 14. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

SEC. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

SEC. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

SEC. 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply: (1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum

payable, but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount. (2) Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof. (3) Where the instrument is not dated, it will be considered to be dated as of the time it was issued. (4) Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail. (5) Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election. (6) Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser. (7) Where an instrument containing the words, "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

SEC. 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

SEC. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

SEC. 20. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

SEC. 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

SEC. 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

SEC. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE II—CONSIDERATION

SEC. 24. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

SEC. 25. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand or at a future time.

SEC. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

SEC. 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

SEC. 28. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

SEC. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party.

ARTICLE III—NEGOTIATION

SEC. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

SEC. 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

SEC. 32. The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue.

SEC. 33. An indorsement may be either special or in blank, and it may also be either restrictive or qualified, or conditional.

SEC. 34. A special indorsement specifies the person to whom or to whose order the instrument is to be payable, and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.

SEC. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

SEC. 36. An indorsement is restrictive, which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

SEC. 37. A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

SEC. 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

SEC. 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

SEC. 40. Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery, but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

SEC. 41. Where an instrument is payable to the order of two or more payees or indorsers who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

SEC. 42. Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

SEC. 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

SEC. 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

SEC. 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

SEC. 46. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

SEC. 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

SEC. 48. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

SEC. 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

SEC. 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he is personally liable.

ARTICLE IV—RIGHTS OF THE HOLDER

SEC. 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

SEC. 52. A holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

SEC. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

SEC. 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

SEC. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful

means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

SEC. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

SEC. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

SEC. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

SEC. 59. Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE V—LIABILITIES OF PARTIES

SEC. 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

SEC. 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

SEC. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse.

SEC. 63. A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

SEC. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

SEC. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision (3) of this section do not apply to persons negotiating public or corporation securities other than bills and notes.

SEC. 66. Every indorser who indorses without qualification warrants to all subsequent holders in due course: (1) the matters and things mentioned in subdivisions (1), (2), and (3) of the next preceding section; and (2) that the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment it shall be accepted or paid or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

SEC. 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

SEC. 68. As respects one another indorsers are liable prima facie in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

SEC. 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section 65 of this act, unless he discloses the name of his principal and the fact that he is acting only as agent.

ARTICLE VI—PRESENTMENT FOR PAYMENT

SEC. 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument, but if the instrument is,

by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

SEC. 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

SEC. 72. Presentment for payment, to be sufficient, must be made (1) by the holder or some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instrument or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

SEC. 73. Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case, if presented to the person to make payment wherever he can be found, or if presented at his last-known place of business or residence.

SEC. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

SEC. 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

SEC. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be found.

SEC. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

SEC. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

SEC. 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

SEC. 80. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

SEC. 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

SEC. 82. Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this act cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied.

SEC. 83. The instrument is dishonored by non-payment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid.

SEC. 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

SEC. 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday.

SEC. 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

SEC. 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

SEC. 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VII—NOTICE OF DISHONOR

SEC. 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

SEC. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

SEC. 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

SEC. 92. Where notice is given by or on behalf of the holder it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

SEC. 93. Where notice is given by or on behalf of a party entitled to give notice it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

SEC. 94. Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

SEC. 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

SEC. 96. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

SEC. 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

SEC. 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative if there be one and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

SEC. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

SEC. 100. Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others.

SEC. 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

SEC. 102. Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

SEC. 103. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: (1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following. (2) If given at his residence, it must be given before the usual hours of rest on the day following. (3) If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

SEC. 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: (1) If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. (2) If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

SEC. 105. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

SEC. 106. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

SEC. 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

SEC. 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address, but if he has not given such address, then the notice must be sent as follows: (1) either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or (2) if he live in one place, and have his place of business in another, notice may be sent to either place; or (3) if he is sojourning in another place, notice may be sent to the place where he is so sojourning. But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

SEC. 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

SEC. 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties, but where it is written above the signature of an indorser, it binds him only.

SEC. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

SEC. 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

SEC. 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

SEC. 114. Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) where the drawer and drawee are the same person; (2) when the drawee is a fictitious person or a person not having capacity to contract; (3) when the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment.

SEC. 115. Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.

SEC. 116. Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

SEC. 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

SEC. 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be, but protest is not required except in the case of foreign bills of exchange.

ARTICLE VIII—DISCHARGE OF NEGOTIABLE INSTRUMENTS

SEC. 119. A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof

by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

SEC. 120. A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

SEC. 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except (1) where it is payable to the order of a third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated.

SEC. 122. The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

SEC. 123. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

SEC. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

SEC. 125. Any alteration which changes: (1) the date; (2) the sum payable, either for principal or interest; (3) the time or place of payment; (4) the number or the relations of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

TITLE II

BILLS OF EXCHANGE

ARTICLE I—FORM AND INTERPRETATION

SEC. 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

SEC. 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

SEC. 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

SEC. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

SEC. 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

SEC. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say in case the bill is dishonored by the non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

ARTICLE II—ACCEPTANCE

SEC. 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

SEC. 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

SEC. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

SEC. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

SEC. 136. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation.

SEC. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

SEC. 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

SEC. 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

SEC. 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

SEC. 141. An acceptance is qualified, which is (1) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; (2) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local, that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees but not of all.

SEC. 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE III—PRESENTMENT FOR ACCEPTANCE

SEC. 143. Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or

place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

SEC. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.

SEC. 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and: (1) Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance, for all, in which case presentment may be made to him only. (2) Where the drawee is dead, presentment may be made to his personal representative. (3) Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

SEC. 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 72 and 85 of this act. When Saturday is not otherwise a holiday presentment for acceeptance may be made before twelve o'clock noon on that day.

SEC. 147. Where the holder of a bill drawn payable elsewhere than at the place of business, or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

SEC. 148. Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance in either of the following cases: (1) where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill; (2) where, after the exercise of reasonable diligence, presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some other ground.

SEC. 149. A bill is dishonored by non-acceptance: (1) when it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or (2) when presentment for acceptance is excused and the bill is not accepted.

SEC. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

SEC. 151. When a bill is dishonored by non-acceptance an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE IV—PROTEST

SEC. 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

SEC. 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

SEC. 154. Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

SEC. 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

SEC. 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary.

SEC. 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

SEC. 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

SEC. 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

SEC. 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE V—ACCEPTANCE FOR HONOR

SEC. 161. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

SEC. 162. An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

SEC. 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

SEC. 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

SEC. 165. The acceptor for honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided, also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

SEC. 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

SEC. 167. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

SEC. 168. Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity. (2) If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 104.

SEC. 169. The provisions of section 81 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

SEC. 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE VI—PAYMENT FOR HONOR

SEC. 171. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

SEC. 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

SEC. 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

SEC. 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

SEC. 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

SEC. 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

SEC. 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE VII—BILLS IN A SET

SECT. 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

SEC. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the right of a person who in due course accepts or pays the part first presented to him.

SEC. 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

SEC. 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course he is liable on every such part as if it were a separate bill.

SEC. 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and

that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

SEC. 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

TITLE III

PROMISSORY NOTES AND CHECKS

SEC. 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the marker's own order, it is not complete until indorsed by him.

SEC. 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

SEC. 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

SEC. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

SEC. 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

SEC. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

TITLE IV

GENERAL PROVISIONS

SEC. 190. This act shall be known as the Negotiable Instruments Law.

SEC. 191. In this act, unless the context otherwise requires: "Acceptance" means an acceptance completed by delivery or notification. "Action" includes counterclaim or set-off. "Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not. "Bearer" means the person in possession of a bill or note which is payable to bearer. "Bill" means bill of exchange, and "note" means negotiable promissory note. "Delivery" means transfer of possession, actual or constructive, from one person to another. "Holder" means the payee or indorsee of a bill or note, who is in possession of it or

the bearer thereof. "Indorsement" means an indorsement completed by delivery. "Instrument" means negotiable instrument. "Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder. "Person" includes a body of persons, whether incorporated or not. "Value" means valuable consideration. "Written" includes printed, and "writing" includes print.

SEC. 192. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

SEC. 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

SEC. 194. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

SEC. 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

SEC. 196. In any case not provided for in this act the rules of the law merchant shall govern.

APPENDIX F

EXTRACTS FROM THE FEDERAL BANKRUPTCY ACT[1]

3. *Acts of bankruptcy.* (*a*) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c) It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said

[1] Act of Congress, July 1, 1898, c. 541, as amended February 5, 1903, June 15, 1906, June 25, 1910, and March 2, 1917. The complete text of the Act with amendments will be found in Collier on *Bankruptcy*, Appendix B, p. 1483.

subdivision 1 the burden of proving bankruptcy shall be on the alleged bankrupt.

4. *Who may become bankrupts.* (*a*) Any person except a municipal, railroad, insurance, or banking corporation shall be entitled to the benefits of this act as a voluntary bankrupt.

b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any incorporated company, and any moneyed business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States.

5. *Partners.* (*a*) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

6. *Exemptions of bankrupts.* (*a*) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

14. *Discharges, when granted.* (*a*) Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b) The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or parties in interest, at such time as will give the trustee or parties in interest, a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or repre-

sentative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court; *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

16. *Co-debtors of bankrupts.* (*a*) The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

17. *Debts not affected by a discharge.* (*a*) A discharge in bankruptcy shall release a bankrupt from all of his probable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity.

63. *Debts which may be proved.* (*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable cost incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the

consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

TABLE OF CASES

GENERAL INDEX

[Figures refer to pages. C and CC refer to "case or cases beginning on page or pages," as CC 423, 425 means cases beginning on pages 423 and 425.]

[See also Index to Appendixes, *infra*]

INDEX TO APPENDIXES

UNIFORM SALES ACT

[Beginning on page 602; figures refer to sections of acts.]

UNIFORM NEGOTIABLE INSTRUMENTS ACT

[Beginning on page 627; figures refer to sections of acts.]

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